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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF TEXAS.
} No. —. 3

ORIGINAL BILL IN EQUITY.

W. H. H. MILLER,
Attorney-General.
EDGAR ALLAN,
Solicitor.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA)
vs.)
THE STATE OF TEXAS.)

To the honorable the Chief Justice and Associate Justices of the Supreme Court of the United States, in chancery sitting:

In pursuance of section 25 of an act of Congress approved the 2d day of May, 1890, entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," the United States brings this, her original bill, against the State of Texas.

Whereupon, humbly complaining, your oratrix, the United States, respectfully showeth: That on the 22d day of February, in the year 1819, a treaty was concluded and was subsequently (to wit, on the 22d day of February, 1821) ratified and proclaimed, between the United States

of America and Spain, which said treaty was intended, as shown by its terms, to "designate with precision the limits of the respective bordering territories in North America" between the two said contracting powers; that by the third article of said treaty it was provided and agreed that—

> The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence by a line due north to the river Arkansas; thence, following the course of the southern bank of the Arkansas to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818.
>
> But if the source of the Arkansas River shall be found to fall north or south of latitude 42, then the line shall be run from the said source due south or north, as the case may be, till it meets the said parallel 42, and thence along the said parallel to the South Sea. All the islands in the Sabine and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States of America, but the use of the waters and the navigation of the Sabine to the sea, and of the said Roxo and Arkansas, throughout the extent of the said boundary on their respective banks, shall be common to the respective inhabitants of both nations.

> The two high contracting parties agreeing to cede and renounce all their rights, claims, and pretensions to the territories described by the said line. That is to say, the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims, and pretensions to the territories lying west and south of the above-described line, and in like manner His Catholic Majesty cedes to the United States all his rights, claims, and pretensions to any territories east and north of the said line, and for himself, his heirs, and successors renounces all claim to the said territory forever.

And your oratrix states that at the date of the conclusion of the treaty aforesaid Mexico constituted a part of the Spanish monarchy, but that Mexico subsequently, in the year 1824, became and was established as a separate and independent power and government, and the boundary line defined and designated in the treaty of 1819, aforesaid, thereby became in part the boundary line between the United States and Mexico, all the territory of the State of Texas being then a part of the Mexican territory.

And your oratrix further states that on the 12th day of January, 1828, a treaty was concluded and was subsequently to wit, on the 5th day of April, 1832, ratified and proclaimed between the United States of America and the United Mexican States, the object and purpose of which said last mentioned treaty was therein declared to be—

> "With the intention to confirm the validity of the aforesaid treaty of limits (treaty of 1819) regarding it as still in force, and binding between the United States of America and the United Mexican States."

And your oratrix further states that subsequently to

the ratification and proclamation of the said treaties of 1819 and 1828, respectively, to wit: In the year 1837, Texas became and was recognized as an independent republic, and no longer under the power and jurisdiction of the Government of Mexico; and that during the existence of the said Republic of Texas, to wit, on the 25th day of April, 1838, a treaty was concluded and was subsequently, to wit, on October 12 and 13, 1838, ratified and proclaimed between the United States of America and the Republic of Texas, by which said treaty it was declared that "The treaty of limits made and concluded on the twelfth day of January, in the year of our Lord one thousand eight hundred and twenty-eight, between the United States of America on the one part and the United Mexican States on the other, is binding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the said Unlimited Mexican States;" which said treaty, after reciting in its preamble that "it is deemed proper and expedient, in order to prevent future disputes and collisions between the United States and Texas in regard to the boundaries between the two countries as designated by the said treaty, that a portion of the same should be run and marked without unnecessary delay," contained the following articles, to wit:

ARTICLE I.

Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the termination of twelve months from the exchange of the ratification of this convention, at New

Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red River. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein.

ARTICLE II.

And it is agreed that until this line is marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised.

But your oratrix states that no further action was ever had or taken to mark the said boundary lines under the said treaty of limits between the United States and the Republic of Texas, but that said treaty was never executed, and said boundary lines were still undecided, when, under and by virtue of a joint resolution of the Congress of the United States, dated March 1, 1845, the Congress of the United States consented that "the territory properly included in and rightfully belonging to the republic of Texas," might be created into a new State, upon certain

conditions, and by another joint resolution of Congress, approved December 29, 1845, which recited the acceptance of these conditions, Texas was admitted into the Union with "the territory properly included within and rightfully belonging to the republic of Texas;" and that by the admission of Texas as one of the United States the boundary line aforesaid become a boundary line between the United States and the State of Texas.

And now your oratrix states that a period of forty years elapsed after the making of said treaty of 1819, without any other action being had or taken looking to an agreement as to the now-disputed boundary lines, than as above stated; without any official survey of any part of said boundary lines being made or any monument or other marks planted to designate any point or points set forth in either of said several treaties, when, from the year 1857 to 1859, under a contract with Jones & Brown and the Commissioner of Indian Affairs, for the United States, an astronomical survey was made of the one hundredth meridian, west from Greenwich, being the boundary line between the Choctaw and Chickasaw country and Texas, the initial point of which said boundary line was determined to be at the intersection of said one hundredth meridian with what was designated at that time upon the maps of the General Land Office of the United States as the Red River, and a monument was thereupon established 30 chains due north from the north bank of said river, the Red River here referred to being what is now known as the Main Red River, as contradistinguished from what is known and delineated upon modern maps as the North Fork of Red River.

And your oratrix further states that shortly after the action, survey, and determination last aforesaid, to wit, in the year 1859, joint commissioners, on the part of the United States on the one part and of the State of Texas on the other part, commenced the work of running the boundary lines between the Territories of the United States and the State of Texas, beginning (in accordance with the act of Congress approved June 5, 1858)—

> At the point where the one hundredth degree of longitude west from Greenwich crosses Red River, and running thence north to the point where said one hundredth degree of longitude intersects the parallel of thirty-six degrees and thirty minutes north latitude, to the point where it intersects the one hundred and third degree of longitude west from Greenwich, and thence south with the said one hundred and third degree of longitude to the thirty-second parallel of north latitude, and thence west with the said thirty-second degree of north latitude to the Rio Grande.

The joint commission here referred to commenced the work assumed by them, but owing to personal differences which sprung up between them they did not long continue in co-operation in the work, but, in the year 1860, the commissioner on the part of the United States completed the running of said boundary lines alone and without the aid and co-operation of the commissioner on the part of the State of Texas, and made report thereof to the General Land Office of the United States in the year 1861.

And your oratrix further states that the result and determination of the said surveys made by Jones and Brown

aforesaid and the commissioner on the part of the United States, under the act of Congress approved June 5, 1858, aforesaid, was to the effect that the true dividing and boundary line between the Indian territories of the United States and the State of Texas, in accordance with the terms of the said treaty of limits between the United States and Spain in 1819 and the subsequent confirmatory treaty between the United States and the United Mexican States, began where the one hundredth meridian touched the main Red River aforesaid, running thence along the line or course of what is now known as the South Fork of the Red River and is claimed by the United States to be the Main Red River or river of the treaty of 1819 aforesaid, and that all the territory lying between the said South Fork or Main Red River and said North Fork of Red River belongs and is subject to the jurisdiction and control of the United States, and does not belong and is not subject to the jurisdiction and control of the State of Texas, but your oratrix admits that no part of said boundary survey has ever been officially agreed upon or accepted by the two governments, as contemplated in the act of Congress authorizing the said survey.

And your oratrix further states that while the question of ownership and jurisdiction over said parcel of territory above described was and had been for years a matter of dispute between the United States and the State of Texas; the said State of Texas assumed to exercise certain jurisdiction and control over said parcel of disputed territory; and after the futile efforts to arrive at an agreement as to said boundary lines through the medium of a joint com-

mission as aforesaid, and before the commissioners engaged in the survey had completed their labors or made report thereon, the State of Texas did, by its legislature, pass an act declaring—

> That all the territory contained in the following limits, to wit: Beginning at the confluence of Red River and Prairie Dog River; thence running up Red River, passing the mouth of South Fork and following Main or North Red River to its intersection with the twenty-third degree of west longitude; thence due north across Salt Fork and Prairie Dog River, and thence following that river to the place of beginning, be, and the same is hereby, created into a county to be known by the name and style of the County of Greer.

Which said act was approved on the 8th day of February, 1860; and has also by other acts of the officers of said State of Texas, acting by virtue of the acts of the legislature aforesaid, assumed and exercised control and jurisdiction over said tract of land or territory aforesaid.

And your oratrix further showeth that notwithstanding the assertions of authority over, and the exercise of jurisdiction by, the State of Texas, as aforesaid, over the parcel of land aforesaid, the conflict of claims between the United States and the State of Texas continued through all the period from the date of the first known act of authority over said parcel of land by the State of Texas until the year 1882, without any other or further action being had or taken by and between the United States and the State of Texas to ascertain and determine the question of boundary aforesaid, when the legislature of the State

of Texas passed an act which was approved on the 2nd day of May, 1882, entitled—

> An act to provide for running and marking the boundary line between the State of Texas and the territory of the United States, from the northeast corner of said State to the degree of longitude 100 west from London and 23 degrees west from Washington, as said line is described in the treaty between the United States and Spain, of February 22, 1819, and for the payment of the expenses of such survey.

The said act contained among others the following provisions:

> SECTION 1. * * * That the governor of this State be, and is hereby, authorized and empowered to appoint a suitable person or persons who, in conjunction with such person or persons as may be appointed by or on behalf of the United States for the same purpose, shall run and mark the boundary lines between the territories of the United States and the State of Texas, as follows: Beginning at a point where a line drawn north from the intersection of the thirty-second degree of north latitude with the western bank of the Sabine River crosses the Red River, and thence following the course of said river westwardly to the degree of longitude 100 west from London and 23 degrees west from Washington, as said line was laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818, and designated in the treaty between the United States and Spain, made February 22, 1819.
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> SEC. 2. Said joint commission will report their survey, made in accordance with the foregoing section of this act, together with all necessary notes, maps, and other papers, in order that in fixing that part of

the boundary between the Territories of the United States and the State of Texas the question may be definitely settled as to the true location of the one hundredth degree of longitude west from London, and whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain, made February 22, 1819; and in locating said line said commissioners shall be guided by actual surveys and measurements, together with such well-established marks, natural and artificial, as may be found, and such well authenticated maps as may throw light on the subject.

SEC. 3. Such commissioner, or commissioners, on the part of Texas, shall attempt to have said survey herein provided for by the joint commission made and performed between the 1st day of July and the 1st day of October, in the year in which such survey is made, when the ordinary stage of water in each fork of said Red River may be observed; and when the main or principal Red River is ascertained as agreed upon in said treaty of 1819, and the point is fully designated where the one hundredth degree of longitude west from London, and twenty-third degree of longitude west from Washington, crosses said Red River, the same shall be plainly marked and defined as a corner in said boundary, and said commission shall establish such other permanent monuments as may be necessary to mark their work.

And following the passage of the act last aforesaid, your oratrix further showeth that in 1885, an act was passed by the Congress of the United States, approved January 31, 1885, entitled:

An act to authorize the appointment of a commission by the President of the United States to run and

mark the boundary lines between a portion of the Indian Territory and the State of Texas, in connection with a similar commission to be appointed by the State of Texas.

The preamble and enacting clause of which last mentioned act are as follows:

Whereas the treaty between the United States and Spain, executed February 22, 1819, fixed the boundary line between the two countries west of the Mississippi River as follows: Beginning on the Gulf of Mexico at the mouth of the Sabine River, in the sea, and continuing north along the western bank of the river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; thence following the course of the Rio Roxo westward to the one-hundredth degree of longitude west from London, and the twenty-third from Washington; thence crossing the said Red River, and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source in latitude 42 degrees north; and thence by that parallel of latitude to the South Sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818; and,

Whereas a controversy exists between the United States and Texas as to the point where the one hundredth degree of longitude crosses the Red River, as described in the treaty; and

Whereas the point of crossing has never been ascertained and fixed by any authority competent to bind the United States and Texas; and

Whereas it is desirable that a settlement of this controversy should be had, to the end that the question of boundary now in dispute because of a differ-

ence of opinion as to said crossing, may also be settled: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and is hereby, authorized to detail one or more officers of the Army, who, in conjunction with such person or persons as may be appointed by the State of Texas, shall ascertain and mark the point where the one hundredth meridian of longitude crosses Red River, in accordance with the terms of the treaty aforesaid, and the person or persons appointed by virtue of this act shall make report of his or their action in the premises to the Secretary of the Interior, who shall transmit the same to Congress at the next session thereof after such report may be made, for action by Congress.

And your oratrix further states that commissioners were by virtue of the act of Congress and the act of the legislature of Texas aforesaid appointed by the respective governments for the purposes as set forth in said acts; that the joint commission assembled for the first time in Galveston, Tex., on February 23, 1886, from which time until the 16th day of August, 1886, said commission was engaged in the formulation of plans and issues, the oral examination of witnesses, the examination of maps and documentary evidence pertinent to the matter of inquiry, the preparation, presentation, and discussion of propositions and issues of fact, and voting thereon, when, upon the date last aforesaid, the said joint commission being unable to agree and reach a determination as to whether the stream now known as the North Fork of Red River or that now called the South Fork or Main Red River was the

river referred to in the treaty of 1819 aforesaid, the said joint commission dissolved and adjourned *sine die*, with the agreement that each commission make its report to the proper authorities and await instructions.

And your oratrix further states that the result and determination on the part of the commissioners for the United States on the joint commission last aforesaid was, "That the Prairie Dog Town Fork is the true boundary, and that the monument should be placed at the intersection of the one hundredth meridian with this stream," which was reported to the Secretary of the Interior as provided by the act of Congress aforesaid, while the result and determination on the part of the commissioners for the State of Texas was—

> That the North Fork of Red River, as now named and delineated on the maps, is the Rio Rojo or Red River delineated on Melish's maps, described in the treaty of February 22, 1819, and is the boundary line of said treaty to the point where the one hundredth degree of west longitude crosses the same.

And your oratrix further states that under and by virtue of the terms of the treaty of 1819 between the United States and Spain, she became entitled to possession of and jurisdiction over all that parcel or tract of land which lies between what has been herein designated as the Prairie Dog Town Fork or Main Red River, and the North Fork of Red River, which said parcel of land, according to the survey made by Jones & Brown, aforesaid, contains 1,511,576.17 acres, and is more accurately described as the extreme portion of the Indian Territory lying west of the north fork of Red River, and east of the one hun-

dredth meridian of west longitude from Greenwich; that she has never voluntarily abandoned or relinquished such claim of title and jurisdiction, but has continuously asserted the same at all times since the ratification of said treaty of 1819 up to the present time, and does still assert the same; that said tract of land was never subject to the jurisdiction or claim of Spain subsequent to the treaty of 1819, aforesaid, nor was it subject to any claim or jurisdiction on the part of Mexico after her independence from Spain was secured and asserted.

Your oratrix further states that after the organization of said territory into a county by the name of Greer County, as aforesaid, the said county was designated as such upon certain maps of the State of Texas, but was never so recognized by or upon any map published by or under any authority of the United States; that on the 24th day of February, in the year 1879, the Congress of the United States passed an act creating and establishing the northern judicial district of Texas; that in arranging said district, access was had to one of said maps of Texas upon which Greer County was designated as aforesaid, and that by inadvertence the said territory was included in said judicial district as a part thereof; but your oratrix avers that said act was in no way intended and can not be lawfully construed as a cession of said disputed territory to the State of Texas, or an abandonment of the claim of the United States thereto, nor was it so regarded by the State of Texas, as already shown in this bill, in the allegation that without any further action on the part of the United States, the said State of Texas did, by the act of May 2, 1882, provide for the appointment of a

commission for the purpose of ascertaining, among other things, "whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain, made February 22, 1819.

And your oratrix further states that the said State of Texas has, without any right or title thereto, claimed, taken possession of, and endeavored to extend its laws and jurisdiction over the said parcel or tract of land hereinbefore described, and does still claim, hold possession of, and exercise certain jurisdiction over the same, and has excluded the United States from possession of and jurisdiction over the same, in violation of the treaty rights of your oratrix as aforesaid; all of which your oratrix charges is a manifest invasion of her sovereign rights and tends to the disturbance of that amity and peace which ought to exist between the authorities of the United States and the State of Texas.

And your oratrix further states that, during the year 1887, the said State of Texas gave public notice of a purpose to survey and place upon the market for sale and to otherwise dispose of the territory embraced within the limits of the disputed territory above described; and was proceeding to eject from certain portions thereof a large number of bona fide settlers who had taken up homesteads thereon; whereupon, on the 30th day of December, 1887, to the end that such wrongful and unlawful acts might be prevented, a certain proclamation was issued by the President of the United States, a copy of which said proclamation is herewith filed, marked Exhibit A, and prayed to be taken and considered as a part of this bill.

In consideration whereof, and forasmuch as your oratrix can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and relievable, and in this court by original bill, to the end and for the purpose of determining and settling the true boundary line between the United States and the State of Texas, and to determine and put at rest questions which now exist as to whether the Prairie Dog Town Fork or the North Fork of Red River, as aforesaid, constitutes the true boundary line of the treaty of 1819, aforesaid, and whether the tract or parcel of land lying and being between two said streams, and called by the authorities of the State of Texas "Greer County," is within the boundary and jurisdiction of the United States, or of the State of Texas, your oratrix prays that she be permitted to file this, her bill of complaint, against the said State of Texas, and that the said State of Texas be made a defendant hereto, and that a proper subpœna in chancery issue herein against the said State of Texas, commanding her, by a day named therein, to appear and make a full and complete answer under the corporate seal of said State, of all and singular the matters aforesaid, as fully and particularly as if the same were here repeated in the form of distinct interrogatories, and more particularly that the said State of Texas shall set forth and define specifically the claim that she hath or may make to the said territory in dispute; and that upon final hearing your honors may enter a decree establishing the rights, claims, and jurisdiction of your oratrix as claimed in her said bill; that your honors will grant

unto your oratrix such other, further, and general relief in the premises as the nature and circum-stances of the case may require, and to equity shall seem meet and proper, that all proper process may issue, and your oratrix will ever pray, etc.

THE UNITED STATES, *complainant*,

By EDGAR ALLAN,

Solicitor for Complainant.

W. H. H. MILLER,

Attorney-General, Counsel.

EXHIBIT A.

(Filed with bill.)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas the title to all that territory lying between the north and south forks of Red River and the hundredth degree of longitude, and jurisdiction over the same are vested in the United States, it being a part of the Indian Territory, as shown by surveys and investigation made on behalf of the United States, which territory the State of Texas also claims title to and jurisdiction over; and

Whereas said conflicting claim grows out of a controversy existing between the United States and the State of Texas as to the point where the hundredth degree of longitude crosses the Red River, as described in the treaty of February 22, 1819, between the United States and Spain, fixing the boundary line between the two countries; and

Whereas the commissioners, appointed on the part of the United States under the act of January 31, 1885, authorizing the appointment of a commission by the President to run and mark the boundary lines between a portion of the Indian Territory and the State of Texas in connection with a similar commission to be appointed by the State of Texas, have by their report determined that the South Fork is the

true Red River designated in the treaty, the commissioner appointed on the part of said State refusing to concur in said report, now, therefore, I, Grover Cleveland, President of the United States, do hereby admonish and warn all persons, whether claiming to act as officers of the county of Greer, in the State of Texas, or otherwise, against selling or disposing of, or attempting to sell or dispose of any of said lands, or from exercising or attempting to exercise any authority over said lands.

And I also warn and admonish all persons against purchasing any part of said territory from any person or persons whomsoever.

In witness whereof I have hereunto set my hand caused the seal of the United States to be affixed.

Done at the city of Washington this thirtieth day of December, in the year of our Lord one thousand and eight hundred and eighty-seven, and of the independence of the United States the one hundred and twelfth.

GROVER CLEVELAND.

[SEAL.]

By the President:

T. F. BAYARD,
Secretary of State.

Supreme Court, U. S.
FILED.
DEC 2 1891
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF TEXAS. } No. —.

AMENDED BILL.

W. H. H. MILLER,
Attorney-General.
EDGAR ALLAN,
Solicitor.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF TEXAS. } Amended bill.

To the honorable the Chief Justice and Associate Justices of the Supreme Court of the United States, in chancery sitting:

Your oratrix, the United States, who has heretofore filed her original bill in this behalf in your honors' court, comes now by leave of the court and files this her amended bill in the cause and shows that in pursuance of section 25 of an act of Congress approved the 2d day of May, 1890, entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," the United States brings this her original bill against the State of Texas.

Whereupon, humbly complaining, your oratrix, the United States, respectfully showeth: That on the 22d day of February, in the year 1819, a treaty was concluded, and was subsequently (to wit, on the 22d day of February,

1821) ratified and proclaimed, between the United States of America and Spain, which said treaty was intended, as shown by its terms, to "designate with precision the limits of the respective bordering territories in North America" between the two said contracting powers; that by the third and fourth articles of said treaty it was provided and agreed that—

ARTICLE 3.

> The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence by a line due north to the river Arkansas; thence, following the course of the southern bank of the Arkansas to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818, a tracing copy of so much of said map as bears relation to the questions involved in this suit is herewith filed, marked Exhibit "A," and prayed to be taken and considered as a part of this bill, and a perfect copy of the whole map will be hereafter filed in the cause.
>
> But, if the source of the Arkansas River shall be found to fall north or south of latitude 42, then the line shall be run from the said source due south or

north, as the case may be, till it meets the said parallel 42, and thence along the said parallel to the South Sea. All the islands in the Sabine and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States of America, but the use of the waters and the navigation of the Sabine to the sea, and of the said Roxo and Arkansas, throughout the extent of the said boundary on their respective banks, shall be common to the respective inhabitants of both nations.

The two high contracting parties agreeing to cede and renounce all their rights, claims, and pretensions to the territories described by the said line. That is to say, the United States hereby cede to His Catholic Majesty and renounce forever all their rights, claims, and pretensions to the territories lying west and south of the above-described line, and in like manner His Catholic Majesty cedes to the United States all his rights, claims, and pretensions to any territories east and north of the said line, and for himself, his heirs, and successors renounces all claim to the said territory forever.

ARTICLE 4.

To fix this line with more precision and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a commissioner and a surveyor, who shall meet before the termination of one year from the date of the ratification of this treaty at Natchitoches, on the Red River, and proceed to run and mark the said line from the mouth of the Sabine to the Red River, and from the Red River to the River Arkansas, and to ascertain the latitude of the source

of the said River Arkansas, in conformity to what is above agreed upon and stipulated and the line of latitude 42 to the South Sea; they shall make out plans, and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein.

And your oratrix states that at the date of the conclusion of the treaty aforesaid Mexico constituted a part of the Spanish monarchy, but that Mexico subsequently, in the year 1824, became and was established as a separate and independent power and government, and the boundary line defined and designated in the treaty of 1819, aforesaid, thereby became in part the boundary line between the United States and Mexico, all the territory of the State of Texas being then a part of the Mexican territory.

And your oratrix further states that on the 12th day of January, 1828, a treaty was concluded and was subsequently, to wit, on the 5th day of April, 1832, ratified and proclaimed between the United States of America and the United Mexican States, the object and purpose of which said last mentioned treaty was therein declared to be—

> With the intention to confirm the validity of the aforesaid treaty of limits (treaty of 1819) regarding it as still in force, and binding between the United States of America and the United Mexican States.

And your oratrix further states that subsequently to the ratification and proclamation of the said treaties of 1819 and 1828, respectively, to wit, in the year 1837, Texas became and was recognized as an independent republic, and no longer under the power and jurisdiction of the Government of Mexico; and that during the existence of

the said Republic of Texas, to wit, on the 25th day of April, 1838, a treaty was concluded and was subsequently, to wit, on October 12 and 13, 1838, ratified and proclaimed between the United States of America and the Republic of Texas, by which said treaty it was declared that "the treaty of limits made and concluded on the twelfth day of January, in the year of our Lord one thousand eight hundred and twenty-eight, between the United States of America on the one part and the United Mexican States on the other, is binding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the said United Mexican States," which said last-mentioned treaty was in great measure prompted by and had its origin in the knowledge that from the date of the said treaty of 1819 with Spain, aforesaid, disputes and collisions had arisen and occurred as to the true boundary lines intended by said treaty to be fixed and determined, and the preamble to said treaty between the United States of America and the Republic of Texas, aforesaid, after declaring among other things that "it is deemed proper and expedient, in order to prevent future disputes and collisions between the United States and Texas in regard to the boundaries between the two countries as designated by the said treaty, that a portion of the same should be run and marked without unnecessary delay," contained the following articles, to wit:

ARTICLE I.

Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the termination of twelve months from the exchange

of the ratification of this convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red River. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein.

ARTICLE II.

And it is agreed that until this line is marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised.

But your oratrix states that no further action was ever had or taken to mark the said boundary lines under the said treaty of limits between the United States and the Republic of Texas, but that said treaty was never executed, and said boundary lines were still undecided, when, under and by virtue of a joint resolution of the Congress of the United States, dated March 1, 1845, the Congress of the United States consented that "the territory properly in-

cluded in and rightfully belonging to the Republic of Texas" might be created into a new State, upon certain conditions, and by another joint resolution of Congress, approved December 29, 1845, which recited the acceptance of these conditions, Texas was admitted into the Union with "the territory properly included within and rightfully belonging to the Republic of Texas;" and that by the admission of Texas as one of the United States the boundary line aforesaid became a boundary line between the United States and the State of Texas, subject to future action being had or taken to mark the said boundary lines as provided by the terms of the said several treaties aforesaid. And your oratrix further showeth that thereafter, to wit, on the 9th day of September, 1850, she did, by act of the Congress of the United States of America and with the approval of her President, purchase a portion of the rightful territory of the State of Texas aforesaid lying north of the parallel of 36 degrees 30 minutes north latitude and west of the meridian of 103 degrees west from Greenwich, which said act of Congress is substantially as follows, to wit:

AN ACT proposing to the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of territory claimed by her exterior to said boundaries and of all her claims upon the United States, and to establish a Territorial government for New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are offered to the State of Texas, which, when agreed to by the said State, in an act passed by the general assembly, shall be binding

and obligatory upon the United States and upon the said State of Texas: *Provided*, The said agreement by the said general assembly shall be given on or before the first day of December, 1850.

First. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degress of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico.

Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, custom-house revenues, arms and munitions of war, and public buildings, with their sites, which became the property of the United States at the time of the annexation.

Fourth. The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half yearly at the Treasury of the United States.

Fifth. Immediately after the President of the United States shall have been furnished with an

authentic copy of the act of the general assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided also*, That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the Treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States: *Provided*, That nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards number of States that may hereafter be formed out of the State of Texas, or otherwise.

And your oratrix further states that thereafter, to wit:

On the 25th day of November, 1850, and within the time limited in said act of Congress, in an act passed by the general assembly of the State of Texas, said State of Texas did agree to and accept said propositions in their entirety, and did agree to be bound by the terms thereof, according to their true import and meaning, in the following public act of the legislature of Texas, to wit:

"An act accepting the propositions made by the United States to the State of Texas, in an act of the Congress of the United States, approved the 9th day of September, 1850, entitled 'An act proposing to the State of Texas the establishment of her north-

ern and western boundaries, the relinquishment by said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a Territorial government for New Mexico.'"

[After reciting the act of Congress above set out]

"*Be it enacted by the legislature of the State of Texas*, That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared that the said State shall be bound by the terms thereof, according to their true import and meaning.

"2d. That the governor of this State be and he is hereby requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress; and that this act take effect from and after its passage.

"Approved, November 25, 1850."

And your oratrix further states that by the terms of said contract and engagement the said State of Texas accepted the true meridian line of 100 degrees west from Greenwich as the point of intersection with the parallel of 36 degrees 30 minutes north latitude, and relinquished and ceded to the United States all her claim to territory exterior to the limits and boundaries aforesaid, but avers that no reference was made in said contract or agreement, nor was there by intendment between the parties thereto any settlement of the question in dispute as to the ownership of the territory between the North Fork of Red River and main Red River, as bounded on the west by the one hundredth meridian aforesaid.

And now your oratrix states that a period of forty years elapsed after the making of said treaty of 1819, without any other action being had or taken looking to an agreement as to the now-disputed boundary lines than as above stated; without any official survey of any part of said boundary lines being made or any monument or other marks planted to designate any point or points set forth in either of said several treaties, when, from the year 1857 to 1859, under a contract with Jones & Brown and the Commissioner of Indian Affairs, for the United States, an astronomical survey was made of the one hundredth meridian, west from Greenwich, being the boundary line between the Choctaw and Chickasaw country and Texas, the initial point of which said boundary line was determined to be at the intersection of said one hundredth meridian with what was designated at that time upon the maps of the General Land Office of the United States as the Red River, and a monument was thereupon established 30 chains due north from the north bank of said river, the Red River here referred to being what is now known as the Main Red River, as contradistinguished from what is known and delineated upon modern maps as the North Fork of Red River.

And your oratrix further states that at the date of said treaty of 1819 so made between the United States and Spain, as aforesaid, and when Melish's map, as improved to January 1, 1818, was made the map of said treaty, the main stream of the Red River ran as is now claimed by your oratrix; that what is called the North Fork of Red River also ran as now claimed by your oratrix; that what is herein claimed as the main Red River, and river

of the treaty, was then, as now, longer and wider and drained a larger area of country, and in all respects corresponded more nearly to the Red River, as laid down on the treaty map, than did the North Fork of Red River, and, in fact, your oratrix avers that the map of the treaty aforesaid shows no stream beyond the confluence of the forks of Red River herein referred to running westward which in any way answers to the condition, direction, and surroundings of the North Fork of Red River.

And your oratrix further avers that at the date of said treaty she had no other guide, knowledge, or information than such as was furnished by Melish's map, aforesaid, of the topography of the country in the vicinity of that part of Red River which skirts the territory now in dispute between your oratrix and the State of Texas; that Melish's map was made by said Melish without any accurate knowledge on his part as to the westward course of Red River beyond the forks before referred to; that he, in fact, had no knowledge of the existence of said forks, and in running the line of said river from the point where subsequent exploration and actual survey have demonstarted their existence, he ran only an imaginary line in the direction which he supposed would lead to the source of said river, having reference in such line to what should thereafter be ascertained as to the actual source and direction of the continuous main stream of the Red River.

And your oratrix further states that at the date of said treaty of 1819 there was no notice to her on the part of the King of Spain of any physical and geographical condition of the territory under discussion in conflict with or

explanatory of the lines and conditions as laid down in Melish's map aforesaid, and she insists and contends that if the King of Spain, as the other contracting party with herself to said treaty, was in possession of such knowledge or information it was his bounden and lawful duty to have imparted such knowledge to your oratrix, and that in determining the obligations of the high contracting parties in said treaty such knowledge and failure to give notice thereof to your oratrix entitles her to a solution and determination in her favor of all controverted questions of boundary growing out of such failure to give notice to your oratrix as aforesaid.

And your oratrix further states that in the year 1852 one Capt. R. B. Marcy, an officer in the Army of the United States, with other officers of said Army as his assistants, by the authority of the United States, made an exploration of the course and sources of the Red River, and on the conclusion thereof published the result of said explorations, showing, among other things, that the stream which your oratrix contends and claims is the river of the treaty with Spain as aforesaid was and is the main stream of Red River, of which fact as well as of the conclusions and determinations reached by Jones and Brown, the surveyors aforesaid, the State of Texas had notice; and that shortly after said last mentioned act on the part of the United States in making said survey, to wit, in the year 1859, joint commissioners, on the part of the United States on the one part and of the State of Texas on the other part, commenced the work of running the boundary lines between the Territories of the United States and the

State of Texas, beginning (in accordance with the act of Congress approved June 5, 1858)—

> At the point where the one hundredth degree of longitude west from Greenwich crosses Red River, and running thence north to the point where said one hundredth degree of longitude intersects the parallel of thirty-six degrees and thirty minutes north latitude, to the point where it intersects the one hundred and third degree of longitude west from Greenwich, and thence south with the said one hundred and third degree of longitude to the thirty-second parallel of north latitude, and thence west with the said thirty-second degree of north latitude to the Rio Grande.

The joint commission here referred to commenced the work assumed by them, but owing to personal differences which sprung up between them they did not long continue in cooperation in the work, but, in the year 1860, the commissioner on the part of the United States completed the running of said boundary lines alone and without the aid and cooperation of the commissioner on the part of the State of Texas, and made report thereof to the General Land Office of the United States in the year 1861.

And your oratrix further states that the result and determination of the said surveys made by Jones and Brown aforesaid and the commissioner on the part of the United States, under the act of Congress approved June 5, 1858, aforesaid, was to the effect that the true dividing and boundary line between the Indian territories of the United States and the State of Texas, in accordance with the terms of the said treaty of limits between the United States and Spain in 1819, and the subsequent confirmatory treaty be-

tween the United States and the United Mexican States, began where the one hundredth meridian touched the main Red River aforesaid, running thence along the line or course of what is now known as the South Fork of the Red River, and is claimed by the United States to be the main Red River or river of the treaty of 1819 aforesaid, and that all the territory lying between the said South Fork or main Red River and said North Fork of Red River belongs and is subject to the jurisdiction and control of the United States, and does not belong and is not subject to the jurisdiction and control of the State of Texas, but your oratrix admits that no part of said boundary survey has ever been officially agreed upon or accepted by the two Governments, as contemplated in the act of Congress authorizing the said survey.

And your oratrix further states that while the question of ownership and jurisdiction over said parcel of territory above described was and had been for years a matter of dispute between the United States and the State of Texas, the said State of Texas assumed to exercise certain jurisdiction and control over said parcel of disputed territory; and after the futile efforts to arrive at an agreement as to said boundary lines through the medium of a joint commission as aforesaid, and before the commissioners engaged in the survey had completed their labors or made report thereon, the State of Texas did, by its legislature, pass an act declaring—

> That all the territory contained in the following limits, to wit: Beginning at the confluence of Red River and Prairie Dog River; thence running up Red River, passing the mouth of South Fork and follow-

> ing main or North Red River to its intersection with the twenty-third degree of west longitude; thence due north across Salt Fork and Prairie Dog River, and thence following that river to the place of beginning, be, and the same is hereby, created into a county to be known by the name and style of the County of Greer.

Which said act was approved on the 8th day of February, 1860; and has also by other acts of the officers of said State of Texas, acting by virtue of the acts of the legislature aforesaid, assumed and exercised control and jurisdiction over said tract of land or territory aforesaid.

And your oratrix further showeth that notwithstanding the assertions of authority over, and the exercise of jurisdiction by, the State of Texas, as aforesaid, over the parcel of land aforesaid, the conflict of claims between the United States and the State of Texas continued through all the period from the date of the first-known act of authority over said parcel of land by the State of Texas until the year 1882, without any other or further action being had or taken by and between the United States and the State of Texas to ascertain and determine the question of boundary aforesaid, when the legislature of the State of Texas passed an act which was approved on the 2d day of May, 1882, entitled—

> An act to provide for running and marking the boundary line between the State of Texas and the territory of the United States, from the northeast corner of said State to the degree of longitude 100 west from London and 23 degrees west from Washington, as said line is described in the treaty between the United States and Spain, of February 22, 1819, and for the payment of the expenses of such survey.

The said act contained among others the following provisions:

SEC. 1. * * * That the governor of this State be, and is hereby, authorized and empowered to appoint a suitable person or persons, who, in conjunction with such person or persons as may be appointed by or on behalf of the United States for the same purpose, shall run and mark the boundary lines between the Territories of the United States and the State of Texas, as follows: Beginning at a point where a line drawn north from the intersection of the thirty-second degree of north latitude with the western bank of the Sabine River crosses the Red River, and thence following the course of said river westwardly to the degree of longitude 100 west from London and 23 degrees west from Washington, as said line was laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818, and designated in the treaty between the United States and Spain, made February 22, 1819.

SEC. 2. Said joint commission will report their survey, made in accordance with the foregoing section of this act, together with all necessary notes, maps, and other papers in order that in fixing that part of the boundary between the Territories of the United States and the State of Texas the question may be definitely settled as to the true location of the one hundredth degree of longitude west from London, and whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain, made February 22, 1819; and in locating said line said commissioners shall be guided by actual surveys and measurements, together with such well-established marks, natural and artificial, as may

be found, and such well-authenticated maps as may throw light on the subject.

SEC. 3. Such commissioner, or commissioners, on the part of Texas, shall attempt to have said survey herein provided for by the joint commission made and performed between the 1st day of July and the 1st day of October, in the year in which such survey is made, when the ordinary stage of water in each fork of said Red River may be observed; and when the main or principal Red River is ascertained, as agreed upon in said treaty of 1819, and the point is fully designated where the one hundredth degree of longitude west from London, and twenty-third degree of longitude west from Washington, crosses said Red River, the same shall be plainly marked and defined as a corner in said boundary, and said commission shall establish such other permanent monuments as may be necessary to mark their work.

And following the passage of the act last aforesaid, your oratrix further showeth that in 1885 an act was passed by the Congress of the United States, approved January 31, 1885, entitled:

An act to authorize the appointment of a commission by the President of the United States to run and mark the boundary lines between a portion of the Indian Territory and the State of Texas, in connection with a similar commission to be appointed by the State of Texas.

The preamble and enacting clause of which last-mentioned act are as follows:

Whereas the treaty between the United States and Spain, executed February 22, 1819, fixed the boundary line between the two countries west of the Mississippi River as follows: Beginning on the Gulf of Mexico at the mouth of the Sabine River, in the sea,

and continuing north along the western bank of the river to the thirty-second degree of latitude; thence by a line due north to a degree of latitude where it strikes the Rio Roxo of Natchitoches or Red River; thence following the course of the Rio Roxo westward to the one hundredth degree of longitude west from London, and the twenty-third from Washington; thence crossing the said Red River, and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source in latitude 42 degrees north; and thence by that parallel of latitude to the South Sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818; and

Whereas a controversy exists between the United States and Texas as to the point where the one hundredth degree of longitude crosses the Red River, as described in the treaty; and

Whereas the point of crossing has never been ascertained and fixed by any authority competent to bind the United States and Texas; and

Whereas it is desirable that a settlement of this controversy should be had, to the end that the question of boundary now in dispute because of a difference of opinion as to said crossing, may also be settled: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and is hereby, authorized to detail one or more officers of the Army, who, in conjunction with such person or persons as may be appointed by the State of Texas, shall ascertain and mark the point where the one hundredth meridian of longitude crosses Red River, in accordance with the terms of the treaty aforesaid, and the person or persons appointed by

> virtue of this act shall make report of his or their action in the premises to the Secretary of the Interior, who shall transmit the same to Congress at the next session thereof after such report may be made, for action by Congress.

And your oratrix further states that commissioners were by virtue of the act of Congress and the act of the legislature of Texas aforesaid appointed by the respective governments for the purposes as set forth in said acts; that the joint commission assembled for the first time in Galveston, Tex., on February 23, 1886, from which time until the 16th day of August, 1886, said commission was engaged in the formulation of plans and issues, the oral examination of witnesses, the examination of maps and documentary evidence pertinent to the matter of inquiry, the preparation, presentation, and discussion of propositions and issues of fact, and voting thereon, when, upon the date last aforesaid, the said joint commission being unable to agree and reach a determination as to whether the stream now known as the North Fork of Red River or that now called the South Fork or Main Red River was the river referred to in the treaty of 1819 aforesaid, the said joint commission dissolved and adjourned *sine die*, with the agreement that each commission make its report to the proper authorities and await instructions.

And your oratrix further states that the result and determination on the part of the commissioners for the United States on the joint commission last aforesaid was—

> That the Prairie Dog Town Fork is the true boundary, and that the monument should be placed at the intersection of the one hundredth meridian with this stream.

which was reported to the Secretary of the Interior as provided by the act of Congress aforesaid, while the result and determination on the part of the commissioner for the State of Texas was—

> That the North Fork of Red River, as now named and delineated on the maps, is the Rio Rojo or Red River delineated on Melish's maps, described in the treaty of February 22, 1819, and is the boundary line of said treaty to the point where the one hundredth degree of west longitude crosses the same.

And your oratrix further states that under and by virtue of the terms of the treaty of 1819 between the United States and Spain, she became entitled to possession of and jurisdiction over all that parcel or tract of land which lies between what has been herein designated as the Prairie Dog Town Fork or Main Red River, and the North Fork of Red River, which said parcel of land, according to the survey made by Jones & Brown, aforesaid, contains 1,511,576.17 acres, and is more accurately described as the extreme portion of the Indian Territory lying west of the North Fork of Red River, and east of the one hundredth meridian of west longitude from Greenwich; that she has never voluntarily abandoned or relinquished such claim of title and jurisdiction, but has continuously asserted the same at all times since the ratification of said treaty of 1819 up to the present time, and does still assert the same; that said tract of land was never subject to the jurisdiction or claim of Spain subsequent to the treaty of 1819, aforesaid, nor was it subject to any claim or jurisdiction on the part of Mexico after her independence from Spain was secured and asserted.

Your oratrix further states that after the organization of said territory into a county by the name of Greer County, as aforesaid, the said county was designated as such upon certain maps of the State of Texas, but was never so recognized by or upon any map published by or under any authority of the United States; that on the 24th day of February, in the year 1879, the Congress of the United States passed an act creating and establishing the northern judicial district of Texas; that in arranging said district, access was had to one of said maps of Texas upon which Greer County was designated as aforesaid, and that by inadvertence the said territory was included in said judicial district as a part thereof; but your oratrix avers that said act was in no way intended and can not be lawfully construed as a cession of said disputed territory to the State of Texas, or an abandonment of the claim of the United States thereto, nor was it so regarded by the State of Texas, as already shown in this bill, in the allegation that without any further action on the part of the United States, the said State of Texas did, by the act of May 2, 1882, provide for the appointment of a commission for the purpose of ascertaining, among other things, "whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain, made February 22, 1819.

And your oratrix further states that after the passage of the said act of Congress of 1885, aforesaid, and while the commissioners appointed thereunder were actually engaged in the duty devolving upon them as aforesaid, to wit, in the year 1886, certain residents of the disputed

territory petitioned the Post-Office Department of the United States, describing themselves as residents of Greer County, Tex., and asking for the establishment of post-offices respectively at Mangum and Frazier, in Greer County, Tex.; that in said year 1886 the prayers of said petitions were granted, and acting upon the designation of locality as set forth in said petitions, said post-offices were established and designated as in Greer County, Tex.; but during the same year, 1886, and on the 27th day of December, in said year, it was discovered by the authorities of the Post-Office Department that said post-offices were located in the territory in dispute; that said territory was claimed by the United States; that it was designated and outlined on the maps of the General Land Office and of the Post-Office Department as not within the limits of the State of Texas, but a part of the Indian Territory of the United States; and thereupon, on said last mentioned day and date, in order to correct the error, the designations of said post-offices were changed so as to locate them within the Indian Territory, and they have been from that date and are still only known, recognized, and described in orders and official acts of the Post-Office Department as located in the Indian Territory aforesaid, and all other post-offices established within said territory since December, 1886, have been established, recognized, and described, and are still so described and recognized, as within the Indian Territory.

And your oratrix further states that the said State of Texas has, without any right or title thereto, claimed, taken possession of, and endeavored to extend its laws and jurisdiction over the said parcel or tract of land here-

inbefore described, and does still claim, hold possession of, and exercise certain jurisdiction over the same, and has excluded the United States from possession of and jurisdiction over the same, in violation of the treaty rights of your oratrix as aforesaid; all of which your oratrix charges is a manifest invasion of her sovereign rights and tends to the disturbance of that amity and peace which ought to exist between the authorities of the United States and the State of Texas.

And your oratrix further states that, during the year 1887, the said State of Texas gave public notice of a purpose to survey and place upon the market for sale and to otherwise dispose of the territory embraced within the limits of the disputed territory above described; and was proceeding to eject from certain portions thereof a large number of bona fide settlers who had taken up homesteads thereon; whereupon, on the 30th day of December, 1887, to the end that such wrongful and unlawful acts might be prevented, a certain proclamation was issued by the President of the United States, a copy of which said proclamation is herewith filed, marked Exhibit B, and prayed to be taken and considered as a part of this amended bill.

In consideration whereof, and forasmuch as your oratrix can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and relievable, and in this court by original bill, to the end and for the purpose of determining and settling the true boundary line between the United States and the State of Texas, and to determine and put at rest questions which now exist as to whether the Prairie Dog Town Fork or the North Fork of Red River, as aforesaid,

constitutes the true boundary line of the treaty of 1819, aforesaid, and whether the tract or parcel of land lying and being between two said streams, and called by the authorities of the State of Texas "Greer County," is within the boundary and jurisdiction of the United States, or of the State of Texas, your oratrix prays that she be permitted to file this, her amended bill of complaint, against the said State of Texas, and that the said State of Texas be made a defendant hereto, and that a proper subpœna in chancery issue herein against the said State of Texas, commanding her, by a day named therein, to appear and make a full and complete answer under the corporate seal of said State, of all and singular the matters aforesaid, as fully and particularly as if the same were here repeated in the form of distinct interrogatories, and more particularly that the said State of Texas shall set forth and define specifically the claim that she hath or may make to the said territory in dispute; and that upon final hearing your honors may enter a decree establishing the rights, claims, and juri-diction of your oratrix as claimed in her said bill; that your honors will grant unto your oratrix such other, further, and general relief in the premises as the nature and circumstances of the case may require, and to equity shall seem meet and proper, that all proper process may issue, and your oratrix will ever pray, etc.

THE UNITED STATES, *Complainant*,
By EDGAR ALLAN,
Solicitor for Complainant.
W. H. H. MILLER,
Attorney-General, Counsel.

EXHIBIT B.

[Filed with amended bill.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas the title to all that territory lying between the North and South Forks of Red River and the hundredth degree of longitude, and jurisdiction over the same are vested in the United States, it being a part of the Indian Territory, as shown by surveys and investigation made on behalf of the United States, which territory the State of Texas also claims title to and jurisdiction over; and

Whereas said conflicting claim grows out of a controversy existing between the United States and the State of Texas as to the point where the hundredth degree of longitude crosses the Red River, as described in the treaty of February 22, 1819, between the United States and Spain, fixing the boundary line between the two countries; and

Whereas the commissioners, appointed on the part of the United States under the act of January 31, 1885, authorizing the appointment of a commission by the President to run and mark the boundary lines between a portion of the Indian Territory and the State of Texas in connection with a similar commission to be appointed by the State of Texas, have by their report determined that the South Fork is the true Red River designated in the treaty, the commissioner appointed on the part of said State refusing to concur in said report, now, therefore, I, Grover Cleveland, President of the United States, do

hereby admonish and warn all persons, whether claiming to act as officers of the county of Greer, in the State of Texas, or otherwise, against selling or disposing of, or attempting to sell or dispose of any of said lands, or from exercising or attempting to exercise any authority over said lands.

And I also warn and admonish all persons against purchasing any part of said territory from any person or persons whomsoever.

In witness whereof I have hereunto set my hand caused the seal of the United States to be affixed.

Done at the city of Washington this thirtieth day of December, in the year of our Lord one thousand and eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[SEAL.] GROVER CLEVELAND.

By the President:

T. F. BAYARD,
Secretary of State.

Office Supreme Court U. S.
FILED,
JAN 9 1891
JAMES H. McKENNEY,
CLERK.

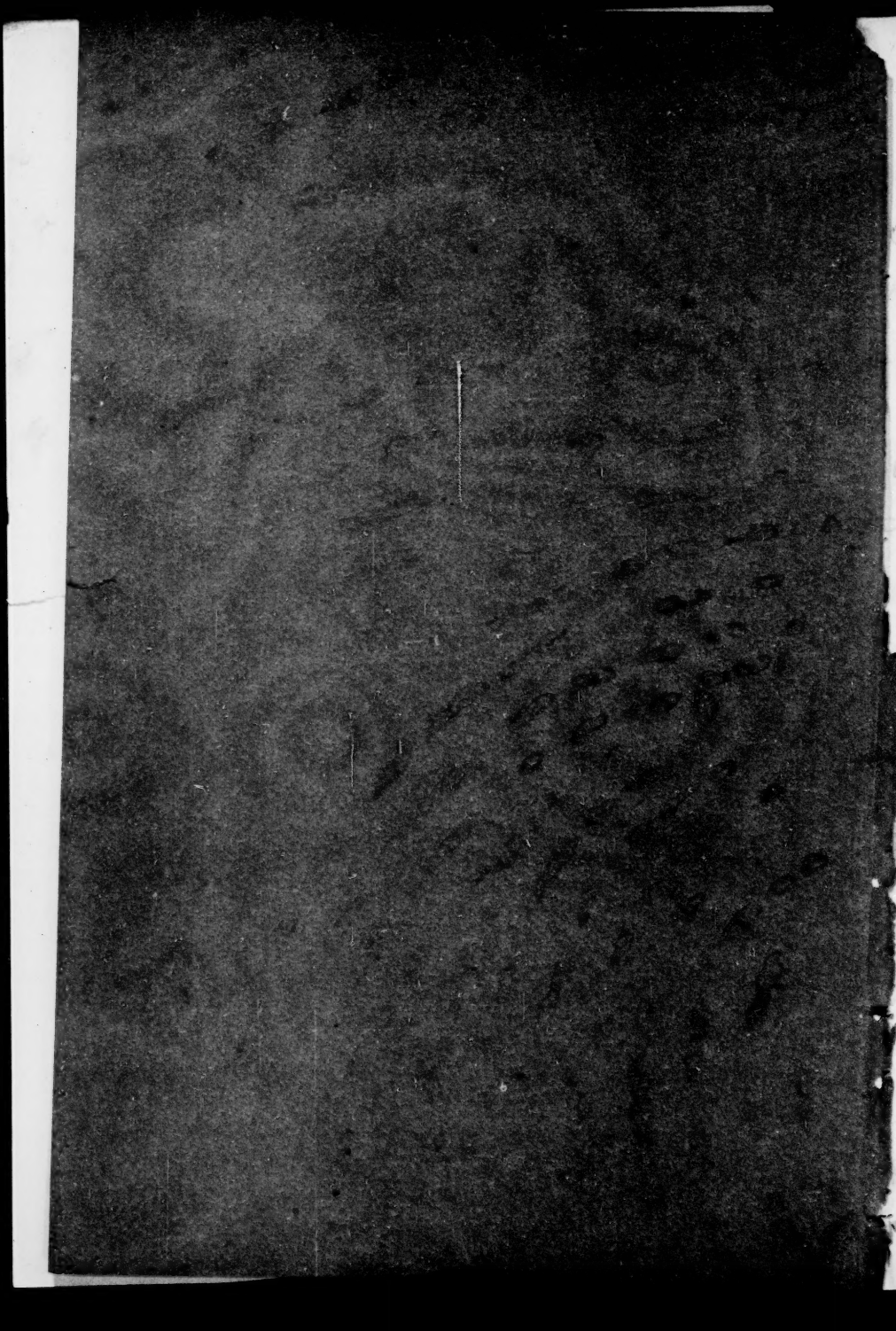
In the Supreme Court of the United States,

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA,
COMPLAINANT,
AGAINST
THE STATE OF TEXAS,
DEFENDANT.
No.

ANSWER OF THE STATE OF TEXAS.

AUGUSTUS H. GARLAND,
JOHN HANCOCK,
GEORGE CLARK,
Solicitors for Defendant.



In the Supreme Court of the United States,

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA,
COMPLAINANT,
vs.
THE STATE OF TEXAS,
DEFENDANT.
No.

THE ANSWER OF THE STATE OF TEXAS, DEFENDANT, TO THE BILL OF COMPLAINT.

This defendant saving and reserving unto herself the benefit of all exceptions to the errors and imperfections in said bill contained, for answer thereto, or to so much thereof as she is advised it is necessary or material for her to answer, does aver and say as follows:

I

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true, in manner and form as the same are therein set forth and alleged, doth demur to said bill. And for causes of demurrer defendant showeth:

1. That it appears by the complainant's own showing by the said bill that she is not entitled to the relief

prayed by the bill against this defendant, in that complainant seeks by her said bill to obtain from this court a decree judicially settling and determining the true boundary line between the United States of America and the State of Texas, which question is political in its nature and character and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the constitution and laws of the United States.

2. That it appears by the terms of complainant's bill that this is a suit by the United States of America against the State of Texas, and it is not competent, under the constitution and laws of the United States of America, for said United States of America to sue one of its component states in her own courts. And especially is it true that said United States is not empowered under her constitution and laws to sue the State of Texas, in a court of the United States, for the recovery of a right mutually claimed by the United States of America and the State of Texas, to-wit, the ownership of certain designated territory, and the establishment of the boundary line between the respective governments.

3. That it appears by the terms of complainant's bill filed in this cause that the complainant claims as the boundary line between the United States of America and the State of Texas, the following designated calls, to-wit: "Begin on the Gulf of Mexico at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Nachitoches or Red river; then following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red river, and running thence by a line due north to the river Arkansas, thence following the course of the

southern bank of the Arkansas to its source in latitude 42 north; and thence by that parallel of latitude to the South Sea. The whole being, as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818." Whereby said Melish's map, so designated, became and is an essential part of said descriptive calls, and without which neither this Court nor defendant are informed definitely as to the limits of complainant's claim, nor the exact extent of territory claimed by complainant in her said bill. Yet to attach the original of said map or an authenticated copy thereof to said bill, complainant has wholly failed, whereby and by reason of such failure, the Court cannot be informed with certainty and definiteness what complainant claims, and said bill is uncertain, defective, and insufficient.

Wherefore, this defendant submits to this Court whether she ought to be required to further answer said bill demurred to.

II

And the said defendant, the State of Texas, not waiving her said demurrer, but saving and reserving to herself the benefit thereof, and of all other exceptions to the many errors and imperfections in said bill contained, for answer to so much thereof as she is advised it is necessary or material for her to answer, does aver and say as follows:

This defendant admits that on the 22d day of February, in the year 1819, a treaty was concluded between the United States of America and the King of Spain, which treaty was intended, as shown by its terms, to "designate with precision the limits of the respective bordering territories in North America" between said high contracting parties, and that it was provided in the third article of said treaty as is fully set out and shown in

complainant's bill. This defendant further admits that at the date of said treaty, and at the date of its ratification and promulgation by the respective powers so contracting, Mexico constituted a part and province of said kingdom of Spain, and that subsequently thereto, to-wit, about the year 1824, Mexico became and was established as an independent power and government, and as such independent power became subject to the terms and stipulations of said treaty of 1819 with respect to boundaries; and that the State of Texas was then, to-wit, in 1824, a part of the Mexican territory in manner and form substantially as stated in complainant's bill.

This defendant further admits as true, that on the 12th day of January, 1828, a treaty was concluded between the United States of America and the United Mexican States, which treaty was subsequently ratified and proclaimed as shown in the bill of complaint, and that the object and purpose of said treaty, as therein declared, is correctly stated in complainant's bill, to confirm the treaty of limits aforesaid of 1819, as still in force and binding between the United States of America and the United Mexican States.

And this defendant further admits, as alleged in the bill of complaint, that subsequent to the treaty last before mentioned between the United States of America and the United Mexican States, to-wit: in the year 1837, Texas became and was recognized as an independent republic, and after the establishment of her independence and her recognition as a separate, independent power, to-wit: On the 25th day of April, 1838, a treaty was concluded, and thereafter subsequently ratified between the United States of America and the Republic of Texas, wherein the treaty aforesaid of 1828 between the United States of America and the United Mexican States was expressly recognized as binding upon the Republic of Texas, the same having been entered into at a time when

Texas formed a part of the said United Mexican States. And this defendant further admits that the preamble and body of said treaty between the United States of America and the Republic of Texas is correctly set out in complainant's bill; and that no further action was ever taken (save to mark and establish the Eastern boundary line of Texas from the mouth of the Sabine river to Red River) until December 29th, 1845, when the congress of the United States adopted a joint resolution admitting Texas into the Union, with its territory properly included in and rightfully belonging to her, in manner and form as alleged in complainant's bill; and thereby Texas became a State of the Union, with its boundaries East, North, and North-west as originally fixed and designated in the treaty of 1819 aforesaid between the United States of America and the King of Spain, when Texas was a part of the Spanish possessions in North America.

But this defendant denies that for a period of forty years after the making of said treaty of 1819, no action was had or taken looking to an agreement as to the now disputed boundary lines, as alleged in the bill of complaint, which allegation implies that said boundary lines have been in dispute between the respective bordering nations and states for a period of more than forty years after the making of such treaty, when in truth and in fact no such controversy has existed until within a recent period, and the pretended claim of complainant to the territory now in controversy was first assumed and asserted nearly forty years after the making of the treaty of 1819 as aforesaid, and is based altogether upon assumptions first made by subordinate military and civil officers of complainant, upon a condition of pretended geographical facts not existing at the date of said treaty, nor for a period of more than thirty years thereafter. This defendant avers, upon information and advice, and will offer proof to support such averments, that at the date of said

treaty of 1819, the physical and geographical condition of the territory under discussion between the representatives of the high contracting parties to said treaty, were well known and understood by at least one of said high contracting parties, to-wit, the King of Spain, which information was imparted to the other contracting party before the conclusion of said treaty. That for a long period of time before the making of said treaty, to-wit, for more than an hundred years, Spain had conquered and occupied, and was claiming by right of conquest and discovery, the whole of the territory beyond the Sabine river on the east and the Pacific ocean on the west, extending northwardly from the Gulf of Mexico to the Missouri river and the river Columbia, and including the territory of Greer county, now the subject matter of this controversy between complainant and defendant. That Spain, through her subjects, had established and maintained, for at least a like period of time, extensive colonies and military establishments throughout the territory of Texas and adjacent territories, to-wit, at San Antonio de Bexar, at Nacogdoches, at Nachitoches, now in the State of Louisiana, at Santa Fe, now in the territory of New Mexico, and at divers other points; and had provided, laid out and maintained travelled ways and roads between her several colonies and settlements aforesaid, the general routes and courses of which roads are known to this day; and had protected, fostered and encouraged commerce and trade between said settlements. That the name "Rio Roxo" was first given to Red River by the Spaniards who conquered Mexico and extended their conquests into the particular locality now in controversy, and north of and across said stream, and that they (the Spaniards) designated said stream as "Rio Roxo of Nachitoches," to distinguish it from another "Rio Roxo," or Red River, already so named and designated in a different locality. That in accordance with their usual custom, the Spanish conquerors upon taking possession of Nachi-

toches and the territory lying on or adjacent to "Rio Roxo," established and laid out a road or route between Santa Fe, in New Mexico, and Nachitoches, now in the State of Louisiana, for the uses of commerce between said places, which road or route traversed the country west and northwest of Nachitoches, along the south bank of said "Rio Roxo," to a point now in county, Texas, then crossed said stream to its north bank, and thence along said north bank to the source of what complainant now styles the "North Fork of Red River," and thence to Santa Fe. That this road was for many years frequently travelled by merchants, traders, trappers, explorers and other persons trading or travelling between said points of Santa Fe and Nachitoches, and at the date of said treaty of 1819, "Rio Roxo of Nachitoches," from its mouth to its source, was well known to the Spaniards, as well as to the Indians and trappers of that region of country, as the stream now called Red River, having its source near the source of the Canadian river, southeast of and near to Santa Fe, in the now territory of New Mexico; thence running in an eastern or south-eastern direction, receiving on its course at intervals the waters of the False Washita river, the Kecheaqueheno or "Prairie Dog Town River," Pease river, Little and Big Wichita rivers, and divers other streams, and emptying its waters into the Mississippi river above New Orleans, in the State of Louisiana. At the date of said treaty of 1819, there was only one "Rio Roxo of Nachitoches" known to geographers or to the people who inhabited the locality of the territory in controversy, and that was the river above described; nor was it ever pretended, assumed or claimed that any tributary stream constituted a branch or fork of said river, but each of such tributary streams were known and designated by particular names, having no reference to Rio Roxo, or classed as a part of said stream; and especially was this true as to the Kecheaquehono or Prairie Dog Town River, which was as well known to the Span-

iards and Indians as Rio Roxo, and from earliest tradition down to the making of said treaty of 1819, and for nearly forty years thereafter, was always known and called "Kecheaquehono," an Indian term meaning "Prairie Dog Town River." Defendant shows that no claim was ever preferred or asserted that the Kecheaquehono river was a fork or branch of Red River, until the year 1852, when Captain R. B. Marcy, then an officer in the army of complainant, claimed to be its first white discoverer, and without law or lawful authority, changed its name from what it had always been called aforetime, and named it the South Fork or Main Red River; and in the like absence of law or lawful authority, the said Marcy gave the name of "North Fork of Red River" to the Rio Roxo of the Spaniards and Indians, and the Rio Roxo of the treaty of 1819. And this defendant avers that this claim of ownership of the territory of Greer county had its origin and inception after the year 1852, and is and has ever been predicated upon an unlawful and unwarranted change of well established geographical names, made by a subaltern officer of complainant nearly forty years after the treaty of 1819, and this the defendant will verify.

This defendant further shows to the Court that the conditions and characteristics of said two streams, to-wit, the Kecheaquehono and Red River, are so totally dissimilar as to manifest the impossibility of their being confounded as branches of the same river, or that the former could ever have been designated as Rio Roxo, which means Red River. This defendant shows that what complainant calls the North Fork of Red River, but which in truth and in fact is Red River, and the "Rio Roxo" of the treaty, is a large, fixed and permanent stream of water, traversing large deposits of clay and gypsum for many miles, which give complexion to its waters, especially in times of freshets, causing them to be red; while the Kecheaquehono, or what since 1852 has been called the

South or Main Fork of Red River, is a fickle, precarious stream, with low banks of sand, running only in times of rainfall, and at other times absolutely dry, and its waters discolored and whitish from the sandy and chalky character of the country it traverses until it empties into Red River. Its waters are baleful and unfit for human use, and the Indians of that region, and before the advent of the whites, avoided its banks and built their villages on the Rio Roxo, or what has been called since 1852 the North Fork of Red River, along the travelled route between Santa Fe and Nachitoches aforesaid, where they were living at the date of said treaty, and were possessed of full knowledge as to the localities and names of all streams in that section of country.

This defendant further shows to the Court that under the terms and provisions of the treaty aforesaid of 1819, it was expressly stipulated, understood, and agreed by and between the high contracting powers thereto that the limits of boundary between the respective nations should be as set forth with substantial accuracy in complainant's bill filed herein, on page 2 of said bill, to which reference is made for greater particularity; that the lines, calls, and objects therein designated, real or imaginary, and especially the line of the one-hundredth meridian of longitude west from London, was not necessarily the true line of said meridian, as the same might thereafter be fixed and determined by actual survey and calculation, but the line of said meridian "as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818," whereby said Melish's map became and was, and, since the date of said treaty, has ever been of controlling significance and importance in the construction of the boundary calls of said treaty; and its delineations of natural objects and imaginary lines, in law, control and qualify such objects and lines as the same might thereafter be

found to exist by actual survey. Now this defendant avers that in the delineation of the 100th degree of longitude West from London upon the map of Melish aforesaid, said meridian is located more than one hundred miles East of the point where said meridian intersects the Rio Roxo or Red River as declared and established by Jones and Brown between the years 1857 and 1859, under the employ of the Secretary of the Interior of complainant, as alleged in the bill of complaint; and the acts and doings of said Jones & Brown in so designating said intersection, was, as this defendant is advised, without authority of law, and had and done without the knowledge, acquiescence, or consent of this defendant, and cannot therefore affect this defendant either at law or in equity. That the line of said one hundredth meridian of longitude West from London, as laid down in said map of Melish, intersects the Rio Roxo, or Red River, a distance of many miles, East of what is claimed by complainant to be the true line of said meridian, and many miles East of the point where the Kecheaquehono empties its waters into the Rio Roxo of the treaty; and said meridian so laid down on Melish's map and extended North to the forty-second parallel of north latitude includes as territory properly belonging and conceded to Spain under the terms of the treaty, and belonging of right to Texas by virtue of the establishment of her independence, a large part of the lands now belonging to the Chickasaw and other tribes of Indians, under concessions by treaty, as well as a portion of the present States of Kansas, and of Colorado, and a part of the territory of New Mexico. Defendant shows that long before and after the date of said treaty of 1819, the King of Spain claimed all this territory lying West of said 100th meridian of longitude and South of said 42d parallel of latitude as laid down upon Melish's map; and in effectuation of such claim, exercised repeated acts of ownership and dominion over the same, without ques-

tion ; and after securing her independence and establishment as an independent nation, the United Mexican States likewise asserted their dominion and authority over said territory ; and Texas, both as a separate republic and as a State of the Union, has claimed and exercised complete ownership and dominion over said territory, including the territory now in controversy, by occupation of said territory by her armies, and by extending the operations of her laws over the same and by various other acts and declarations, until the happening of the matters and things now here to be shown and set forth.

This defendant shows to the Court that on, to-wit, the 1st day of March, 1845, the congress of the United States, by joint resolution, proposed its consent that the territory properly included within, and rightly belonging to the Republic of Texas, might be erected into a new State to be called the State of Texas, upon the following conditions (among others), to-wit :

1. That said State should be formed, subject to the adjustment by the United States, of all questions of boundary that might arise with other governments.

2. That new States of convenient size, not exceeding four in number in addition to said State of Texas might thereafter be formed out of the territory of said Republic of Texas, and that such States so formed out of that portion of said territory lying south of thirty-six degrees thirty minutes of North latitude should be admitted into the Union with or without slavery, as the people of such State, asking admission, might desire; and that in such States so formed out of said territory North of said parallel of latitude, slavery or involuntary servitude (except for crime) should be prohibited.

Whereby the complainant, the United States of America, in the most solemn form of law, undertook, promised, and agreed that upon the acceptance of said propositions (and other propositions embraced in said joint resolution) by the Republic of Texas in manner and form as therein designated, that she, the United States of

America, would recognize the ownership of the Republic of Texas to extensive territories North of thirty-six degrees thirty minutes North latitude, as well as South of said parallel, and that she, the United States of America, would adjust and settle all questions of boundary between the Republic of Texas and all other governments, so that the territory properly included within and rightly belonging to the Republic of Texas might be erected into a State of the Union. And thereafter, to-wit, on June 23d, 1845, the existing government of the Republic of Texas, through the congress of said Republic, by joint resolution entitled: "Joint resolution giving the consent of the existing government to the annexation of Texas to the United States," approved June 23d, 1845, did consent that the people and territory of the Republic of Texas might be erected into a new State to be called the State of Texas, upon the terms, guarantees and conditions proposed in the joint resolution of the congress of the United States; and thereafter, to-wit, on the 4th day of July, 1845, and in accordance with the terms of said joint resolution last mentioned, the people of the Republic of Texas, in convention assembled in their sovereign capacity, by ordinance, did ordain and declare that they assented to and accepted the proposals, conditions, and guarantees contained in the first and second sections of the joint resolution of Congress of the United States aforesaid. And thereupon Texas was admitted as a component State of the United States upon the terms, conditions, and guarantees of said original joint resolution of March 1st, 1845.

This defendant further shows that thereafter, to-wit, on the 11th day of February, 1850, this defendant, as a declaration of her continuous right of ownership and of sovereignty over the whole of that portion of her territory lying South of forty-two degrees of North latitude and West of the hundredth meridian of longitude West from London, as laid down upon Melish's map aforesaid

did, through its legislative and executive departments, adopt and promulgate the following public joint resolution, to-wit:

Resolved by the Legislature of the State of Texas, That all that territory which lies East of the Rio Grande, and a line ruuning North from the source of the Rio Grande to the forty-second degree of North latitude, and South of the forty-second degree of North latitude, and West and South of the line designated in the treaty between the United States and the late Republic of Texas (meaning thereby the treaty of 1838, referred to in complainant's bill) of right belongs to the State of Texas, is included within her rightful civil and political jurisdiction, and the State of Texas will maintain the integrity of her territory. Approved February 11th, 1850."

And thereafter, to-wit, on the 9th day of September, A. D., 1850, complainant, the United States of America, in the execution of the terms and guarantees of annexation aforesaid, by solemn public act of her Congress, and with the approval of her President, conceded the right and dominion of defendant over all of said territory and offered to purchase a portion of such rights of territory, to-wit, all that portion lying north of parallel thirty-six degrees thirty minutes North latitude, and East of the true one hundredth meridian of longitude West from Greenwich and north of what was then Red River, and also that portion of said territory lying west of the 103d meridian of longitude west from Greenwich and north of the 32d parallel of north latitude, for the price and consideration of ten millions of dollars, and in legal and actual effect conceding to defendant the ownership and dominion of all the remainder of said territory, including the particular territory in controversy in this suit, which public act of Congress is substantially as follows, to-wit:

"An Act proposing to the State of Texas the establishment of her Northern and Western boundaries, the relinquishment by the said State of territory claimed by

her exterior to said boundaries and of all her claims upon the United States, and to establish a Territorial government for New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are offered to the State of Texas, which, when agreed to by the said State, in an act passed by the General Assembly, shall be binding and obligatory upon the United States and upon the said State of Texas, *provided*, the said agreement by the said General Assembly shall be given on or before the first day of December, 1850.

"First. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico.

"Second. The State of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement.

"Third. The State of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, ports, arsenals, customhouse revenues, arms and munitions of war, and public bulldings with their sites, which became the property of the United States at the time of the annexation.

"Fourth. The United States in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the State of Texas the sum of ten millions of dollars in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half yearly at the treasury of the United States.

"Fifth. Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the General Assembly of Texas accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided for in the fourth article of this agreement: *Provided also*, That no more than five millions of said stock shall be issued until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the treasury of the United States releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury and approved by the President of the United States: *Provided*, That nothing herein contained shall be construed to impair or qualify anything contained in the third article of the second section of the joint resolution for annexing Texas to the United States, approved March first, eighteen hundred and forty-five, either as regards number of states that may hereafter be formed out of the State of Texas, or otherwise."

And thereafter, to-wit, on the 25th day of November, 1850, and within the time limited in said Act of Congress, in an act passed by the General Assembly of the State of Texas, said State of Texas, defendant herein, did agree to and accept said propositions in their entirety, and did agree to be bound by the terms thereof, according to their true import and meaning, in the following public act of the Legislature of Texas, to-wit:

"An Act accepting the propositions made by the United States to the State of Texas, in an act of the Congress of the United States, approved the 9th day of September, 1850, entitled 'An Act proposing to the State of Texas the establishment of her Northern and Western boundaries, the relinqishment by said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico.'"

(After reciting the act of Congress above set out)

"*Be it enacted by the Legislature of the State of Texas*,

That the State of Texas hereby agrees to and accepts said propositions; and it is hereby declared that the said State shall be bound by the terms thereof, according to their true import and meaning.

"2d. That the Governor of this State be and he is hereby requested to cause a copy of this act, authenticated under the seal of the State, to be furnished to the President of the United States by mail as early as practicable; and also a copy thereof, certified in like manner, to be transmitted to each of the Senators and Representatives of Texas in Congress; and that this act take effect from and after its passage.

"Approved, November 25, 1850."

Whereby said propositions and their acceptance became and was a contract and engagement between complainant and defendant, of binding legal force upon both of said governments, and an estoppel upon each government forbidding either to claim or demand aught of the other in contravention of the terms of said contract; which estoppel this defendant here now expressly pleads in bar of the relief prayed for by complainant, and in bar of any recovery in this suit by complainant. For this defendant avers and shows to the Court that said contract has been in all things accepted and performed by complainant and defendant, by the payment by complainant of the money consideration therein stipulated, and the abandonment by defendant of all claim of right or ownership of the territory so ceded to complainant by the State of Texas. Defendant is advised by her counsel and, so believing, states that the legal effect of the terms of said acts of purchase and sale of certain designated territory hitherto claimed by the State of Texas, under the terms of the treaty of 1819, was the abandonment by the United States of America of all claim of right, title or interest in and to any or further territory then claimed by Texas, under said treaty, situate in the locality of the territory in controversy, and not embraced within the terms of said legislative agreement; that the obvious purpose and in-

tent of said agreement was, on the part of both governments, to peaceably and patriotically settle and adjust forever between themselves, and under the terms and spirit of annexation, all disputed questions of boundaries between complainant and defendant arising upon the treaty of 1819, between Spain and the United States, and resulting from the establishment of the independence of Mexico, and of the independence of Texas, as well as the conquest of Mexico by the United States, and the cession of territory to the latter by the terms of the treaty of Guadaloupe Hidalgo between the United States and Mexico in 1848; that but one Red River was known at the date of said governmental agreement, which fixed the boundaries of Texas to the Gulf of Mexico on the south, and that said boundary had already been fixed from said Gulf at the mouth of the Sabine river, in the sea north to Red River, as defined in said treaty, by respective commissioners on the part of both governments, that of complainant and defendant; and that no necessity ever existed, nor was it ever contemplated by the hig' contracting powers to the treaty of 1819, that the boundary line between the two countries as determined by the Rio Roxo should ever be actually run or otherwise fixed. And so defendant believes, and believing so avers, that said agreement was, and was intended to be, an absolute finality, forever settling and fixing the boundaries of Texas, so far as complainant was concerned, and by reason thereof, complainant cannot recover in this suit.

Further answering, this defendant shows to the Court that the ownership and dominion over the territory in controversy has ever since said year of 1850 been continuously asserted and exercised by defendant, and repeatedly conceded by complainant in the most solemn forms. Defendant shows that repeatedly between the years 1850 and 1860, this defendant sent her soldiers upon said territory to drive off hostile and marauding savages and to protect her citizens therein; that on

the 8th day of February, 1860, this defendant created said territory into a county, called Greer county, as a part of her government, by an act of her legislature as set out in complainant's bill (page 9); that thereafter said county was duly organized as a county of the State of Texas, to-wit: in the year ———, and ever since has possessed civil government and institutions, and enjoyed the benefit of the laws of Texas for the protection of life, liberty and property; that this defendant, under the general policy of her laws, has caused many public schools to be established in said county for the free education of the children of said county, which schools have been maintained for many years, and are now being maintained by public taxes, contributed by all the people of Texas for that purpose; that defendant has established her civil and criminal courts in said county for the redress of wrongs, public and private, which courts are sustained by the general public revenues of the defendant; that said county composes parts of Senatorial and Representative districts in the State legislature of defendant, and the people thereof, for many years, have enjoyed the benefit of equal laws, with all other citizens of Texas, made and enacted by representatives of their own selection; and that this defendant, in her sovereign right of eminent domain and as owner of the soil, has dedicated and set apart one-half of the public domain of said county to be devoted exclusively to the cause of free public education. All these and many more acts of governmental control and ownership of said territory have been public, open and notorious, and well known to complainant, its officers, agents, and servants; yet until the year of 1887, complainant, by its silence, acquiesced in the settlement of the boundary controversy made and entered into, in good faith and upon a valuable consideration, by the respective governments of the United States of America and the State of Texas, in 1850, when, in the year aforesaid, to-wit, on the 30th day of Decem-

ber, 1887, it pleased the President of the United States to issue his proclamation, without the authority of Congress therefor being first had and obtained, warning all persons from attempting to sell or buy any lands in Greer county, Texas, or from attempting to exercise any authority over said lands, said proclamation being, in effect, a claim or assertion of title in the complainant to Greer county, Texas, by the executive of complainant, which proclamation, it is admitted by defendant, is correctly set out as an exhibit to complainant's bill. Now this defendant avers, upon information and belief, that long before the issuance of said proclamation, complainant, by repeated acts of her government, executive and legislative, had, with full knowledge of the facts, substanstantially conceded that Greer county belonged of right to Texas, and not to the territories of the United States; for that, ever since the settlement of said county by white men, to-wit, since about the year ——— the executive department of the government of the United States has established and maintained post offices and post roads in said county, has advertised publicly for bids for carrying the United States mails over routes in said county, designating, as defendant is advised, said post-offices and post routes as lying in Greer county, Texas, and not as lying in the territory allotted to the Indians; and the Congress of the United States, presumably with full knowledge of the situation and all the facts, on to-wit, the 24th day of February, 1879, passed an act creating and establishing the northern judicial district of Texas, in which act Greer county was recognized as rightfully belonging to Texas, and constituted a part of her domain; and by the express terms of said act Greer county was constituted a part of said northern judicial district of Texas, which act received the sanction and approval of the President of the United States; and after its passage, said district was so constituted and said courts duly organized thereunder, which courts have ever

since exercised federal jurisdiction over Greer county, as a part of said judicial district, with the full knowledge of the President of the United States and of the Attorney General of the United States, and without their public dissent. This defendant says that in view of these facts and other acts of recognition of the right of Texas to the territory in question, it does not lie with the executive department of the United States, complainant, to question the right of Texas to her territory in controversy, because, in the opinion of officers of said executive department, the Congress of the United States were deceived in the passage of said act of February 24th, 1879, or failed to inform itself of the facts regarding the situation; nor, it is submitted, can the powers of this Court or of any other court be invoked to correct a supposed mistake of the Congress, or its supposed ignorance of the facts, when Congress itself has remained silent, for the presumption of law is conclusive and beyond the domain of question or controversy, as this defendant is advised, that the law-making department of the government of complainant, acts upon full knowledge of existing laws and conditions upon the passage of all acts. And so this defendant says that by reason of the premises, and the repeated acts and claims of Texas to Greer county, maintained and asserted for more than fifty years before the bringing of this bill, and conceded by repeated acts on the part of the Congress and of the executive department of the United States, including the act of settlement of 1850 aforesaid, is a complete bar against the assertion of any claim to said county by complainant, and is so pleaded.

This defendant denies that the surveys and reports made by Brown & Jones, or their conclusions as to boundary between complainant and defendant, possess any weight or significance, either as pleading or as evidence in this cause; and it also denies that the object and purpose of the act of the Legislature of the State of

Texas, approved May 2, 1882, and which act is set out at length in complainant's bill (p. p. 9 to 11), was to ascertain, among other things, whether the North Fork of Red River, or the Prairie Dog Fork of said river, is the true Red River designated in the treaty between the United States and Spain, made February 22, 1819. This defendant shows that the true purpose of said act is fully disclosed in its title, which purpose is declared therein to be "to provide for running and marking the boundary line between the State of Texas and the territory of the United States, from the northeast corner of said State to the degree of longitude 100 west from London, and 23 degrees west from Washington, *as said line is described in the treaty between the United States and Spain, of February 22, 1819*, and for the payment of the expenses of such survey." And defendant denies that it was ever contemplated, either by Texas in the passage of the act aforesaid, or by the United States in the passage of the act of January 31, 1885, (which is also set out in complainant's bill, p. p. 11 to 13), that the acts of the commissioners therein provided for should in any manner be final, or that the surveys, designations, or locations to be made by said commissioners, either jointly or severally, should be conclusive upon any question of difference between the respective governments, it being expressly provided in the act of Congress aforesaid that the commissioners should "ascertain and mark the point where the one hundredth meridian of longitude crosses Red River, *in accordance with the terms of the treaty aforesaid*," and persons appointed under said act were directed to make report of their action in the premises to the Secretary of the Interior, who should transmit the same to Congress at its next session, for such action as Congress might choose to take. Defendant avers that the acts, or failures, or disagreements of said joint commissioners, as well as their respective separate conclusions and their reports to their respective governments, are wholly irrelevant

to the issue about to be joined between the parties before this Court; and the attempts of parties at interest to adjust their differences without a resort to the courts of the country, cannot throw light upon the issue nor aid the Court in reaching a determination as to which of the parties, complainant or defendant, owns Greer county. And it is averred that the acts aforesaid, recited in the bill of complaint, can only serve to demonstrate that at the date of their several passages, the respective parties hereto were each claiming to own said county, and were willing to try their respective titles thereto by some mode other than by an action at law or a suit in equity.

And for further answer in this behalf, the defendant, the State of Texas, says (waiving nothing by way of defense hereinbefore set up), that by a true and proper construction of the terms of the treaty of 1819, between the United States and Spain, the complainant is not and never has been the rightful owner of the territory in controversy and now claimed by her. Defendant shows that by the terms of said treaty it was never contemplated by the high contracting powers that any necessity existed or would ever exist for running the boundary line between the two countries along Red River, or Rio Roxo, it being conceded by both of said contracting parties that said Red River was a well-known and established stream, and that the only lines of said boundary necessary to be actually run and fixed were the points beginning at the mouth of the Sabine river in the sea, and thence north to the Rio Roxo, and also the point beginning at the point where the one hundredth meridian of longitude west from Greenwich intersected the Rio Roxo, as laid down upon Melish's map, and the river Arkansas. Defendant avers that one of the main inducements for fixing the boundary as finally agreed upon between said powers, was a belief, as urged by complainant, that the lines so agreed upon would obviate the necessity for appointing commissioners to fix said lines with more precision, except for the purpose of

establishing the point where the river Sabine should fall upon the thirty-second parallel of latitude and the line thence north to Red River, and the point of latitude on the ridge of snow mountains north of Rio Roxo. That Melish's map, made part of said treaty, and which governed and controlled the contracting powers in making said treaty, fixed the one hundredth degree of longitude west from London, relative to certain well-known and permanent natural objects, which are found to exist to this day, and among these natural objects so delineated on said map were the Great Bend of the Arkansas river, the mouth of the Canadian river, the Wichita Mountains, the bend of Red River to the northward, and the watershed and great basin toward the source of Red Rver.

Defendant says that each and all of these surface characteristics, as they appear on said map of Melish in relation and juxtaposition to the Rio Roxo of said treaty, and the hundredth meridian of longitude as there laid down, are found to exist to this day in similar relation to what complainant calls the North Fork of Red River, and bear no such relation or juxtaposition with the Prairie Dog Town river, or South Fork, as designated by complainant. Wherefore, defendant says that by the terms of said treaty and of Melish's map as aforesaid, the Rio Roxo of the treaty is and was the North Fork of Red River, so called by the complainant, and not the Kecheaquehono or South Prong of Red River, as styled by complainant, all of which will more fully appear to the Court by reference to said map; and that the line of said hundredth meridian, as laid down on said map, crosses Red River east of the mouth of said South Fork, and does not cross said South Fork at any point. And this the defendant will verify, and by reason whereof, she avers that Greer county hath ever been the territory of Texas and of those to whom Texas is successor, and not to the United States, as claimed in this suit.

And having thus made answer to said bill, the defend-

ant, the State of Texas, prays that she be hence dismissed, with her reasonable costs in this behalf most wrongfully sustained.

THE STATE OF TEXAS.

By .....

Governor.

AUGUSTUS H. GARLAND,
JOHN HANCOCK,
GEORGE CLARK,
Solicitors for Defendant.

THE UNITED STATES OF AMERICA,
STATE OF TEXAS.

Before me.....a Notary Public, of the county of Travis and State of Texas, this day, personally appeared Lawrence S. Ross, known to me to be the Governor of said State, who being duly sworn, deposes and says that he is acquainted with the contents of the foregoing answer, and that the allegations and averments of said answer, in so far as the same are stated absolutely are true, and such as are stated upon advice, information, or belief, he believes them to be true.

.....

Sworn to and subscribed before on this the ..... day of....., A. D., 189.....

.....

Notary Public, Travis county, Texas.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE STATE OF TEXAS,
Defendant.

No.

Answer of the State of Texas to the Amended Bill of Complaint.

CHARLES A. CULBERSON,
Attorney-General of Texas.
AUGUSTUS H. GARLAND,
JOHN HANCOCK,
GEO. CLARK,
Solicitors for Defendant.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA,
COMPLAINANT,

AGAINST

No. .....

THE STATE OF TEXAS,
DEFENDANT.

THE ANSWER OF THE STATE OF TEXAS TO THE AMENDED BILL OF COMPLAINT.

This defendant, saving and reserving to herself the benefit of all exceptions to the errors and imperfections in said amended bill contained, for answer thereto, or to so much thereof as she is advised it is necessary or material for her to answer, says as follows:

That heretofore, to-wit, on the ..... day of ....., 189 , in this cause, this defendant, under the terms of the order of this court, appeared and filed her answer to the original bill of complaint herein filed. That there is nothing set forth in the said amended bill of complainant not already fully and sufficiently answered by this defendant in her said original answer; and she here now adopts and reaffirms her said original answer to the

original bill herein as an answer to said amended bill as fully as if interposed in due form; and she prays the same benefit thereof in all things as if filed in response to such amended bill; and she hereby reserves and insists upon all points of defense, both of law and fact, set up and contained in said answer to the original bill, and prays as therein prayed.

THE STATE OF TEXAS,

By _____,

Governor.

CHAS. A. CULBERSON,

Attorney-General of Texas.

A. H. GARLAND,

JOHN HANCOCK,

GEO. CLARK,

Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 18891.

THE UNITED STATES OF AMERICA
Complainant

vs.

THE STATE OF TEXAS
Defendant.

MOTION AND AMENDED ANSWER.

SOLICITORS FOR DEFENDANT:

A. H. GARLAND,
JOHN HANCOCK,
GEORGE CLARK,
C. A. CULBERSON.

R. J. Gray,

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 18891.

The United States of America,
Complainant,

vs.

The State of Texas,
Defendant.

No. 5. Original.

Leave of the Court first had and obtained, the defendant the State of Texas comes and further amends her original answer in this behalf heretofore filed, and assigns the following additional cause of demurrer to other causes set forth in said original answer, numbering said additional cause of demurrer as No. 4, and which said cause of demurrer is as follows:

4. That this Court sitting as a Court of Equity has no jurisdiction to hear and determine this controversy between complainant and defendant, because, as appears from complainant's bill and amended bill, complainant's cause of action is legal and not equitable, and that it is a suit or action to recover certain real property claimed by complainant and fully described in the bill of complaint; and if complainant has any right to recover, such right must be asserted, if at all, in a court

of law and not in a court of equity as herein attempted. And this defendant further says that so much of the Act of Congress of May 2d, 1890, under which this suit is brought, and which authorizes and directs the Attorney-General of the United States to commence in this court in the name and on behalf of the United States and to prosecute to a final determination a proper suit in equity setting forth the title and claims of the United States to the tract of land in controversy, is unconstitutional and void in this, that it is not competent under the constitution of the United States for the Congress of the United States to declare that a suit at law shall be a suit in equity, and that legal rights shall be tried and determined in the courts of the United States as if they were equitable rights.

And of this demurrer, in connection with other causes of demurrer set forth in said original answer, this defendant prays judgment of the court and that this suit be dismissed at cost of complainant.

A. H. Garland,
John Carroll,
Jno. Clark,
C. A. Culberson,
B. F. Gray,

Solicitors for Defendant.

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. A. D. 18891.

The United States of America,
Complainant,

vs.

The State of Texas,
Defendant,

No. 5. Original.

Comes the defendant, and presents to the court an amendment she desires to file to her answer in this cause, which she deems material and important; and she moves the court for leave to file the same with like effect as if it had been a part of such answer as originally filed herein.

A. H. Garland,
John Brancock,
George Gano,
C. A. Culberson,
R. J. May.

Solicitors for Defendant.

Office Supreme Court U. S.
FILED.
MAR 9 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA
v.
THE STATE OF TEXAS.

Replication to answer to amended bill.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES OF AMERICA } Replication to answer to amended bill.
v.
THE STATE OF TEXAS.

The United States of America, repliant, saving and reserving unto herself all advantage of exception to the insufficiencies of the answer of the State of Texas herein, for replication thereunto says: That she will aver and prove her amended bill of complaint in this cause to be true, certain, and sufficient in the law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto; without this, that any other matter in said answer contained, material or effectual in law to be replied unto, confessed or avoided, traversed or denied, is true; all of which this repliant is or will be ready to aver and prove, as this honorable court shall direct, and prays as in and by her said bill she has already prayed.

THE UNITED STATES OF AMERICA,
By EDGAR ALLAN,
Solicitor for Complainant.

W. H. H. MILLER,
Attorney-General.

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JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1891.

THE UNITED STATES, COMPLAINANT,
vs.
THE STATE OF TEXAS, DEFENDANT.
} No. 5. Original.

COMPLAINANT'S BRIEF FOR ARGUMENT ON DEMURRER.

W. H. H. MILLER,
Attorney-General.
EDGAR ALLAN,
Special Assistant to the Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

THE UNITED STATES, COMPLAINANT,
vs.
THE STATE OF TEXAS, DEFENDANT. } No. 5. Original.

COMPLAINANT'S BRIEF FOR ARGUMENT ON DEMURRER.

The original bill in this cause was filed in October, 1890, for the purpose of securing settlement of a long-continued controversy as to what constitutes the true boundary line between the United States and the State of Texas under the treaty of 1819, between the United States and Spain, to which respondents filed a demurrer and answer. Complainant subsequently, by leave of the court, filed an amended bill, to which respondent, without demurring, "adopts and reaffirms her said original answer to the original bill herein as an answer to said amended bill."

The two principal grounds of demurrer, however, raise questions of jurisdiction.

First, because the settlement of a question of boundary between the United States and a State of the Union is claimed to be "political in its nature and not susceptible of judicial determination by the court;" and—

Second, It is contended that "it is not competent, under the Constitution and laws of the United States, for said United States to sue one of its own component States in her own courts."

As the court itself would take cognizance of so grave a question without regard to the pleadings, they will be treated as though the demurrer were pleaded to the amended bill.

DOES THE BILL PRESENT A POLITICAL QUESTION.

It is not necessary to discuss this question in its bearing upon questions of boundary between the United States of America and a foreign power.

The relations between a State and the Federal Union are not analogous with international relations.

If each of the States of the Union be recognized as a foreign power, then this controversy must cease as a judicial matter and be relegated to the political powers of the parties to the dispute, *i. e.*, the United States of America and the foreign government named Texas. In such a view the rule reiterated by Mr. Justice Gray in the case of *Jones* vs. *The United States* (137 U. S., 202–212), with a citation of numerous authorities in its support, would certainly close the doors of this tribunal against the hearing and the relief prayed for in the bill.

But the reason of this rule as to conflicts with foreign powers seems to furnish as the test, that where there is no common tribunal to which each of the parties can of right fly for judicial protection then they must depend upon their ability to demonstrate that might is right. This seems to have been the judgment of this court in *Foster* vs. *Neilson* (2 Pet., 306), to which reference will be made hereafter.

In the earlier contests regarding the relation of the States to the Federal power, the doctrine was contended for that all boundary questions were of a political character; but this court, after looking "to the history of the times, and the state of things when the Constitution was framed and adopted, to ascertain the old law, the mischief and the remedy," has repeatedly and uniformly declared that disputes as to State boundary are the subject for judicial procedure and determination.

Before the adoption of the Constitution the States, exercising full sovereign power, could settle such controversies by any known methods of political determination, peaceable or forcible; but the ninth article of confederation between the several States wisely averted the threatened dangers by providing "that the United States, in Congress assembled, shall also be the last resort, on appeal, in all disputes and differences now subsisting, or which may hereafter arise between two or more States concerning *boundary* jurisdiction or any other cause whatever;" and furthermore vested in the Congress "power to appoint a judicial tribunal to decide on the petition of either of the parties claiming land under grants of two

or more States who had adjusted their boundaries, but had previously made the grants on which the controversy arose. (*Rhode Island* vs. *Massachusetts*, 12 Pet., 727; *Lessee of Sims* vs. *Irvine*, 3 Dall., 425–454; *Mackett* vs. *Silk*, 11 Pet., 2, 18; and *Burton* vs. *Williams*, 3 Wheat., 529–533.)

After the adoption of the Constitution, the ever-present evil of the confederation—lack of a proper fixed tribunal clothed with judicial power to settle controversies between States—was removed, and article 3 of the Constitution clothed the Federal courts with the power to establish justice and insure domestic tranquility between all the States of the Union. It did not say in terms *to settle questions of boundary*, but in its construction of that article, on the very question now before the court, it was held in the case already cited:

> That the Constitution, which emanated directly from the people in conventions in the several States, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of confederation, adopted by the mere legislative power of the States, had given to a special tribunal appointed by Congress, whose members were the mere creatures and representatives of State legislatures, appointed by them, without any action by the people of the State. (R. I. *vs.* Mass., 727.)

And in the same case this court, after commenting (p. 724) upon the constitutional inhibition against States settling their own boundaries, as being intended among other things "to guard against the derangement of their *federal*

relations," gives its reasons leading to the construction of the jurisdiction assumed as to the boundary in dispute, as follows:

> We can not make an exception of controversies relating to boundaries without applying the same rule to *compacts* for settling them; nor refuse to include them in one general term, when they have uniformerly been included in another. Controversies about boundary are more serious in their consequences upon the contending States, and their relations to the Uni n and governments, than compacts and agreements. If the Constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful States can take possession, to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power, the possession of the large State must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated.
>
> Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting or persuading a State which has possession of disputed territory to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made when it is left to the pleasure of the State in possession; but when it is known that some tribunal *can* decide on the right, it is most probable that controversies will be settled by compact. (*Ib.*, p. 726.)

The distinction between the status of this question before and after the adoption of the Constitution is thus laid down in the same exhaustive review of the subject:

> Under the confederation the States were free to settle their controversies, of any kind whatever, by compact or agreement; under the Constitution they can enter into none, without the consent of Congress, in the exercise of its *political* power, thus making an amicable adjustment a political matter for the concurring determination of the States and Congress, and its construction a matter of judicial cognizance by any court to which the appropriate resort may be had by the judiciary act. (*Ibid.*, p. 739.)

Since the decision of this court in the case just quoted the question of Federal judicial power over boundary questions *between States* has been a settled doctrine, resting upon these facts:

First. That under the confederation of States they were subject to judicial determination.

Second. That the only known controversies existing between one State and another, or between "two or more States" at the time the Constitution was adopted, were controversies in regard to boundary, no less than eleven such controversies then threatening the domestic tranquillity.

Third. The identical question was mooted in the convention which framed the constitution, upon a suggestion that such controversies be excluded from the jurisdiction of the courts (journal of convention, p. 226) and the proposed amendment was voted down.

Fourth. The constitution, in the light of these facts, was adopted without limitation or exception as to the class of

controversies between States, which should be subject to the jurisdiction of the Federal courts. (*R. I.* vs. *Mass.*, 12 Pet., 736–7); *Fla.* vs. *Ga.*, 17 How., 478; *Missouri* vs. *Iowa*, 7 How., 660; *Ala.* vs. *Ga.*, 23 How., 505; *Va.* vs. *W. Va.*, 11 Wall., 39.

THIS RULE SHOULD GOVERN THIS CONTROVERSY.

If it be admitted that as between States the question of boundary is the subject of judicial determination rather than political power, the same reasoning by which such questions were relegated to the courts for adjustment, applies with added force where one of the States disputes as to boundary affecting the extent of the public domain, which, in a certain sense, is the property of all the States.

Under the political powers of the President of the United States, he must take care that the laws be faithfully executed, and to do so, he must, in the absence of, or so far as governed by, Congressional legislation, determine the extent of boundaries of the territory over which they are to be executed; and in the case now before the court the record shows the exercise of this power by the Executive as to the territory claimed and the use of the military arm of the Government to eject settlers therefrom. (P. 11–15 Additional documentary evidence.)

Adopting the contention of the United States as to the powers and duties of the President, as set forth in the brief filed by the Attorney-General in Ex parte Thos. Henry Cooper, recently argued here, we repeat:

> In enforcing the laws he must determine over what territory they are to be enforced. It is, of course,

> conceded that Congress may by legislation control his action, but in the absence of legislation the power to decide territorial sovereignty must be with him. In the enactment of laws generally Congress defines no boundaries for their enforcement of such laws; he must decide, then, what that limit is (pp. 104–5, Brief).

To maintain that the question involved in this controversy is shut out from judicial inquiry and determination because its decision pertains to the political relations and powers of the nation to the States would, upon a proper case, be conclusive against the State of Texas, for by proper Executive authority the boundary was surveyed by Jones and Brown and found to be as now contended for by the United States; this was affirmed by the boundary commissioners appointed in 1859; the Commission appointed under the act of Congress of 1885 reported the same result and determination, and, acting upon these various legislative and executive acts, the President of the United States, in 1887, by a proclamation based upon the last-named report, did "admonish and warn all persons, whether claiming to act as officers of the county of Greer, in the State of Texas, or otherwise, against * * * exercising or attempting to exercise any authority over said lands." (Exhibit A, with bill.)

The State of Texas, on page 19 of her answer to complainant's bill, assails the virtue of this proclamation, and says, "it pleased the President of the United States to issue his proclamation, without the authority of Congress therefor being first had and obtained;" but if it was a political question the President was fortified in his posi-

tion and proceedings from the facts before noted and from the additional fact that in the session of Congress, 1881–'82, Mr. Wellborn, M. C., of Texas, introduced into the House of Representatives a bill (H. R. 1715) to so define the boundaries of the State of Texas as to include the disputed territory within its limits (p. 137, record), which was referred to the Committee on the Judiciary, who reported that they were "decidedly of the opinion that * * * the claim of the State of Texas is unwarranted," and presented a substitute, which was adopted and became a law. (P. 1421, House Journal, first session, 1881–'82. See p. 150, record.

A similar proclamation as to this same territory was issued by President Arthur on July 1, 1884, when not a dozen white settlers were located in Greer County. (E. R. Claunch, ans. to ques. 4, and J. R. Crouch, ans. to ques. 3.)

The President also had a precedent for his action, as appears from case of *Barry* vs. *McDuffie*, cited in *Carr* vs. *United States* (98 U. S., p. 436).

The history of the pending case shows that the Presidential hand was, by the State of Texas through her representative, invoked to stay its threatened exercise of power "until the question of proprietorship of the disputed territory shall have been settled either by act of Congress or by *judicial decree under Congressional sanction*" (p. 118, record); and in furtherance of this view, the Congressional sanction suggested was given by the passage of the bill under which this suit was brought, said bill being introduced by Senator Coke, of Texas. (Senate Journal, Fifty-

first Congress, first session, pp. 28, 103, 142. Vol. 21, Congressional Globe, Fifty-first Congress, first session, p. 174.)

The treaty with Spain, proclaimed February 22, 1821, has already been the subject of inquiry and construction by this court. (*Florida* vs. *Georgia*, 17 How.)

In *Foster* vs. *Neilson*, 2 Pet., 306, the court says that—

> In a controversy between two nations concerning national boundary, * * * there being no common tribunal to decide between them, each determines for itself on its own rights, and if they can not adjust their differences peaceably the right remains with the strongest. The judiciary is not that department of the Government to which the assertion of its interest against *foreign powers* is confided.

But it draws the distinction clear cut and plain between treaty provisions political and judical, as follows:

> Our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it *operates of itself, without the aid of any legislative* provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislative must execute the contract before it can become a rule for the court. (*Ibid* p. 313–14.)

Such is the rule only in regard to treaties made with a foreign power.

But is a State of the Union a foreign power in the sense embraced in the defendant's plea? This was at one time

insisted upon to deny the appellate jurisdiction of this court over the judgment of a State court, but this court overruled the point, and, discussing the relations of the several States to the General Government, says:

> This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the Federal judiciary as completely foreign to that of a State, and as being no more connected with it, in any respect whatever, than the court of a foreign state. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the Constitution the argument fails with it. This hypothesis is not founded on any words in the Constitution which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of State courts, with that constitutional relation which subsists between the Government of the Union and the governments of those States which compose it.
>
> Let this unreasonableness, this total incompatibility, be examined. That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects the American people are one; and the Government, which is alone capable of controlling and managing their interests in all these respects, is the Government of the Union. It is their Government, and in that character, they

have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her Government is complete; to all these objects, it is competent. The people have declared that, in the exercise of all powers given for these objects, it is supreme. *It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.* The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. *These States are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate.*

In a Government so constituted is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution? We think it is not. We think that in a Government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and *so far as is necessary to their attainment.* The exercise of the appellate power over those judgments of the State tribunals which may contravene the Constitution or laws of the United States is, we believe, essential to the attainment of those objects. (Cohens *vs.* Virginia, 6 Wh., §§ 413–15.)

This doctrine of superior sovereignty was even more distinctly asserted by this court in the opinion delivered by Mr. Justice Harlan in Cherokee Nation *vs.* Kansas Railway Company (135 U. S., 656), wherein it is laid down that—

> It must be received as a postulate of the Constitution that the Government of the United States is invested with full and complete power to execute and carry out its purposes.

The third section of the treaty makes a certain stream, the Red River, a boundary line between the United States and Spain; through successive governments this treaty is reaffirmed and readopted, and is finally agreed upon as the line between the United States and the State of Texas. A question of fact arises as to which of two streams is the river referred to. The legislative department of the Government, by two separate acts, endeavors to obtain an amicable agreement on the question, and failing so to do, it has remitted the parties to this tribunal for a determination of the vexed question.

In Cherokee Nation *vs.* Georgia, the bill was dismissed for want of jurisdiction, but not on the ground that the boundary line or land in dispute was a political question, for Chief Justice Marshall, delivering the opinion, says:

> The mere question of right might perhaps be decided by this court, in a proper case with proper parties, but the court is asked to do more than *decide on the title*. (5 Pet., 20.)

The jurisdiction of the court was, however, denied upon other grounds. (*Ib.*, 18, 19.)

The case presented by this bill, then, is one involving an interpretation of a provision in a treaty and also the construction of a law of the United States—the act by which Texas was admitted as one of the States of the Union, unentangled by any executive or legislative determination which can bind the court in its opinion upon the merits. The court is asked, not to *make*, but to *find* a boundary which two contracting parties are unable to agree upon by the terms of their contract. But as in the case last cited, and also Osborn *vs.* Bank of the United States (9 Wh., 819), *a proper case may be made up*; still the questions of jurisdiction may be defeated for the lack of proper parties; and those two points are so inseparably connected in the case at bar that it would seem impossible to pass upon the sufficiency of the "case" without coupling therewith the jurisdiction of the court as to the "parties" now before it.

DEMURRER NO. 2.

That this is a case arising under the laws of the United States, under a treaty made, and that both the treaty and the law were made under authority of the Constitution, will not be questioned.

The basis of the jurisdiction invoked is twofold; first the treaty, which has the force and dignity of a law of the land, and secondly the act of Congress, passed in pursuance of its constitutional authority, providing for the admission of Texas as a State of the Union. (5 U. S. Stat. L., 797, 798.)

One of the conditions of Texan annexation was that questions of boundary arising with other governments

should be subject to adjustment by this Government, and another was that Texas should "retain all the vacant and unappropriated lands lying within its limits." (P. 13, Record.)

The controversy to which the United States is a party and to which the State of Texas is also a party is really whether there was embraced within the limits of Texas that territory which lies east of the one hundredth meridian and between the north and south forks of Red River; and whether, under the law of the United States referred to, Texas has the right to exercise jurisdiction and sovereignty over the same, to the exclusion of the United States, in its control and jurisdiction over the public domain.

The determination of whether this is a question which excludes judicial cognizance by the federal power must involve, as primary thereto, the point raised in the second demurrer of the defendants, namely, has the court jurisdiction over the "parties" to this controversy?

THE JUDICIAL POWER

of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made * * * and to controversies to which the United States shall be a party. (Art. 4, sec. 2, Const. U. S.; Chisholm *vs.* Georgia, 2 Dall., 419; Cohens *vs.* Virginia, 6 Wheat., 379; Tennessee *vs.* Davis, 100 U. S., 263 *et seq.*; Irving *vs.* Marshall, 20 How., 564; and Martin *vs.* Hunter's lessee, Wheat., 304.)

The *power* is extended to controversies to which the United States is a party. The jurisdiction, so far as providing and designating a tribunal, is left to the will of Congress, subject only to the special jurisdiction named in the Constitution. The clause giving jurisdiction over controversies to which the United States shall be a party was omitted in the original draft of the Constitution, but was afterward inserted without apparent opposition. (Journal of Convention, 226, 297–8.)

NATIONAL POLICY AS TO NATIONAL CONTROVERSIES.

The provisions of the Constitution show a clear purpose to have them adjudicated in the federal courts. The judiciary acts and the decisions of the courts concur in this reasoning and construction. (Federalist, 364–5. 1 Kent. Com., 402, 403. Martin *vs.* Hunter, etc., 1 Wh., 330. Desty's Fed. Con., 208 and cit. Osborn *vs.* U. S. Bank, 9 Wh., 882. Mayor *vs.* Cooper, 6 Wall., 247. Ames *vs.* Kan., 111 U. S., 462, cit.)

In the case last cited the extent of the judicial powers of the United States under article 3, section 1 of the Constitution are presented at length, and the conclusion reached that as to the jurisdiction conferred by that article over suits to which a State shall be a party the same may be instituted without the State's consent, that consent being already given through the powers vested by the Constitution. (111 U. S., 463–4–5.)

In Cohens *vs.* Virginia, just quoted, the question of the jurisdiction of this court over a State was claimed to be original *only* (pp. 289, 298), and discussing this propo-

sition it is urged that as early as the year 1803, in Marbury *vs.* Madison (1 Cranch, 174), this court had denied its original jurisdiction, because there was no party to the record who was embraced in the constitutional grant of such power.

These two cases, considered together, so far from concluding against the case now before the court, seem to sustain it, or at least to show that it is not confined to the elements therein contained.

In Marbury *vs.* Madison, the court only held that it could not exercise original jurisdiction by virtue of an act of Congress over parties as to neither of whom original jurisdiction was conferred by the Constitution itself.

In Cohens *vs.* Virginia it was contended that the effect of the decision in Marbury *vs.* Madison was that where the Constitution expressly gave original jurisdiction it excluded appellate jurisdiction, and that since in that case the court could not take original jurisdiction in the absence of proper parties, therefore it could take no appellate jurisdiction in the case where a State was a party, because it had *only* original jurisdiction in such a case. The fallacy of this reasoning as well as its inconsistency with the attitude of Virginia during the period of discussion preceding the adoption of the Constitution is argued with much force and strengthened by historical quotations in Cohens *vs.* Virginia, 351–358.

And the opinion of the court (Marshall, C. J.) makes contemporaneous history confirm the view that the appellate jurisdiction of the court was clear, though it had original jurisdiction as to *one* of the parties (*Ib.*, 412–19).

This court has then held:

1. That the grant of original jurisdiction does not exclude its appellate power where a State is a party.

2. That its original jurisdiction can not be enlarged by legislative enactment.

It has been sometimes contended that the opinion in Marbury *vs.* Madison extends beyond the point here maintained, but this view is based, said Mr. Marshall, on some *dicta* of the court, and as to them he says:

> If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit *where the very point is presented for decision*. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. (*Ib.*, 398).

The dissenting opinion of Mr. Curtis (J.), indeed, goes so far as to say that the decision in Marbury *vs.* Madison settled the construction of the Constitution in favor of the view now advanced by the State of Texas, and asserts that no one who has examined the subject now questions it. He says:

> I am not aware that any doubt has ever been entertained by anyone that controversies to which the United States are a party come under the appellate jurisdiction of this court in this distribution of jurisdiction by the Constitution. Such is the clear meaning of the words of the Constitution. So it was construed by the Congress in the judiciary act of

> 1789, which, by the eleventh section, conferred on the circuit courts jurisdiction of cases in which the United States are *plaintiffs*, and so it has been administered to this day. (*Ib.*, 504.)

There is nothing in the above-cited fact, however, save the individual opinion of the dissenting justice, which can come in conflict with the position now contended for by the United States in respect to the jurisdiction sought by the bill in this case.

There is no controversy raised here against the repeated decisions of this court, or the plain language of the Constitution, that as to controversies to which the United States shall be a party, the jurisdiction of this court is appellate only, with this simple reservation, that if in such a controversy a case arises which involves a party embraced in the original jurisdiction of the court then by the Constitution the jurisdiction is original, and is so in this case because a State is a party to the controversy.

Nor is it necessary to question the construction placed by Congress upon the provision, by the act of 1789, conferring jurisdiction on the circuit courts of cases in which the United States are *plaintiffs*. Surely it can not be seriously contended that where the Congress exercised a constitutional prerogative in establishing "inferior courts" through which the General Government could protect its interests in matters which ought not to encumber and embarrass the court of last resort, it thereby, even by implication, denied the original jurisdiction of *this* court over a controversy between the United States and a State.

The act referred to could not, and did not mean to provide, if the United States should have a controversy in a

case which affected an ambassador or other public minister, that the original jurisdiction of this court could not be maintained because the United States was plaintiff, and the inferior courts had jurisdiction upon that ground.

Such a legislative intent is negatived by the admitted fact that for many years Congress held to the construction that it had the power to extend the original jurisdiction; an opinion concurred in by many in the early years of our history.

In United States *ex.* Ferreira (13 How., 52) Chief Justice Taney says, in his note to the case:

> The case of Yale Todd was docketed by consent in the Supreme Court, and the court appears to have been of opinion that the act of Congress of 1793, directing the Secretary of War and the Attorney-General to take their (the court's) opinion upon the question, gave them original jurisdiction. *In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court in cases not enumerated in the Constitution, was maintained by many jurists and seems to have been entertained by the learned judges who decided Todd's case.* But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and I believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress can not enlarge it. In all other cases its power must be appellate.

We are warranted, then, in the statement that the question here presented comes now before the court as a direct issue for the first time and may be considered and passed

upon without being hampered by any prior adverse adjudication, upon a review of the purposes of the Constitution in this part of the instrument, and in the light of the contemporaneous history, as well as the earlier construction given to its provisions.

The first fact forced upon us by this investigation is that in considering the surrender of sovereignty by the States, the framers deliberately inserted the clause extending the Federal power to controversies "between a State and citizens of another State."

Incidentally, but not directly, the question involved in the issue now under consideration was referred to by the court in Chisholm *vs.* Georgia (2 Dall., 419).

It was contended (p. 423) by the Attorney-General that "the limitations which the Federal Government is admitted to impose on (State) powers are diminutions of sovereignty, at least equal to the making of them defendants," and this was the judgment of the court. (*Ib.*, 467, 468.)

Discussing the proposition touching the attitude of a Sate as defendant under the Constitution, Mr. Jay, Chief Justice, says:

> Words are to be understood in their ordinary and common acceptation, and the word "party" being, in common usage, applicable both to plaintiff and defendant, we can not limit it to one of them in the present case. (*Ib.*, 477.)

This language was used by the learned Chief Justice in answering a query propounded to him-self, whether when the Constitution gave this court original jurisdic-

tion "in cases in which a State shall be a party" it meant a party plaintiff only, and he decided the question in the negative.

It is true that the adoption of the eleventh amendment has abolished the right of a "a citizen of another State, or citizens or subjects of any foreign state" to subject a State to the Federal judicial power, but it leaves undisturbed the judgment of this court that where a State is referred to in the Constitution as a party in a case, it does not limit her attitude to that of a party plaintiff.

The Federal jurisdiction in this case is claimed because the United States has a controversy over which the Federal judicial power extends and that controversy is with a State, therefore the jurisdiction is original.

The term "controversy" applies to the subject-matter without relation to the parties thereto. The controversy as to the Texas boundary line might have arisen with a lesser dignitary than the State of Texas, and it would have been cognizable by the "inferior tribunal" constitutionally appointed; not because the United States was plaintiff, but because no party thereto was a subject of original jurisdiction in this court.

A further illustration is found in the history of the Court of Claims. The United States consents to be sued in that court; several of the States, Texas among the number, have there litigated claims against the Government; appeal lies to this court from the decisions of that tribunal. Could it be maintained that a State being plaintiff in that court, could not appeal to this court against an adverse judgment, because the jurisdiction of this court was original where a State was a party? And yet,

it has been the principal argument against the jurisdiction now invoked, that under the Constitution this court has only appellate jurisdiction where the United States is a party, because she is not named in the original jurisdiction conferred.

Such is not the language and, we submit, is neither a reasonable nor just construction of the article under discussion. Indeed Chief Justice Marshall, in delivering the opinion of the court in *Cohens* vs. *Virginia* (sec. 405), declares "that, as the Constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the Constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party." So we now contend that its original jurisdiction remains where a State is a party, although as to the subject of the controversy its jurisdiction is appellate. Quoting further from that opinion we find this language:

> These provisions of the Constitution are equally obligatory and are to be equally respected. If a State be a party the jurisdiction of this court is original; if a case arise under a constitution or law the jurisdiction is appellate. But a case to which a State is a party may arise under the Constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions so far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument. (*Ibid.*, 392.)

> The Constitution declares that in cases where a State is a party the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party. It may be conceded that where the case is of such a nature as to admit of its originating in the Supreme Court it ought to originate there; but where from its nature it can not originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult and subversive of the spirit of the Constitution to maintain the construction that appellate jurisdiction can not be exercised where one of the parties might sue or be sued in this court. (*Ibid*, 394.)

A State is properly a party only when it is on the record as such and it sues or is sued in its political capacity. (Story on the Con., § 1685; *Fowler* vs. *Lindsey*, 3 Dall. R., 411; *N. Y.* vs. *Conn.*, 4 Dall. R., 1, 3, 6; *U. S.* vs. *Peters*, 5 Cranch, 115, 139.)

The application of the term controversy in the section referred to has been defined as "particularly appropriated to such disputes as might arise *between the United States and any one or more States* respecting *territorial* or fiscal matters." (1 Tucker's Black. Com., App., 42-21.)

Discussing the reason and wisdom of this provision Mr. Story says:

> It would be a perfect novelty in the history of national jurisprudence as well as of public law that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States

> the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals. And there would not only not be any *compulsory power* over those courts to perform such functions, but there would not be any means of producing uniformity in their decisions. A sovereign without the means of enforcing civil rights or compelling the performance, either civilly or criminally, of public duties on the part of the citizens would be a most extraordinary anomoly. It would prostrate the Union at the feet of the States. It would compel the National Government to become a suppliant for justice before the judicature of those who were, by other parts of the Constitution, placed in subordination to it. (Story's Cons., secs. 1674 1679, 4th ed. Story's Cons., pp. 740, 741, Appendix.)

And again, the same learned authority, after drawing a parallel between the scene of horror which distracted and desolated Germany until the institution of the imperial chamber with the "irritating effects resulting from territorial disputes" within our own borders, in speaking of this jurisdiction, says:

> Some tribunal, exercising such authority, is essential to prevent an appeal to the sword and a dissolution of the Government. That it ought to be established under the national rather than under the State government; or, to speak more properly, that it can be safely established under the former only, would seem to be a position self-evident, and requiring no reason to support it. It may justly be presumed that under the National Government, in all controversies of this sort, the decision will be impartially made, according to the principles of justice, and all

> the usual and most effectual precautions are taken to secure this impartiality by confiding it to the highest judicial tribunal. (*Ibid.*, sec. 1681; the Federalist, 554.)

It thus seems clear that the reasoning of this court in the cases of Hans *vs.* Louisiana (134 U. S., 1) and North Carolina *vs.* Temple (*ibid.*, 22) as to the grant of judicial power in "all cases" arising under the Constitution, laws, and treaties of the United States, while reiterating the doctrine that a sovereign State was not liable to suit *by an individual* without its consent, can have no application where the United States seeks, through the original jurisdiction of this court, in a controversy to which both the United States and a State are the parties, to obtain, without resort to the political prerogative, a just and equitable determination of the cause of conflict.

Before the Constitution went into effect it was the right of one aggrieved State or sovereign, to demand satisfaction from another offending State or sovereign, and to enforce, if need be, that demand by war. This danger was removed by the "more perfect union" established under the Constitution; but it could hardly have been the intention of the Constitution that the frame of government it established should, while providing for the protection of the weak against the encroachment of the strong, as between two States—leave matters of controversy, liable and very likely to arise between the United States and a State, to the arbitrament of the political power, and not the same judicial arbitrament that was, by the Constitution, provided for the settlement of differences arising between the States themselves. Nor is it reasonable that the United States,

representing the interests of all the States, should be compelled to await the pleasure and submit to the perpetually enjoining processes to provide "the laws and delays" which a delinquent State has power to enact in the control of its internal government. (Curtis' Com., Vol. 2, p. 62.) Yet, this, or the appeal to the sword, are the alternatives suggested by the respondent's plea.

It would be interesting to hear the learned counsel who represent the State of Texas show a limitation upon the right of a State to resort to arms after failure at arbitration if, under the Constitution, a question of boundary is as contended, only within the political powers of the governments involved. Place them in the position of having "no common tribunal to decide between them" and the State is left as to this question in the attitude she occupied before entering the Union—free, independent, sovereign—compelled, it may be, to submit peaceably to what she deems an invasion and spoliation of her territory, but possessing the right recognized by the law of nations to resist with arms the real or imaginary encroachments. Yes, we submit that the logical sequence of a declaration by this court in favor of the position contended for is, that the failures at arbitration already made in this controversy may be followed by a declaration of war.

In case of actual invasion or imminent danger, a State may declare war, by virtue of section 10, clause 3, article 1 of the Constitution of the United States; and this reserved right embraces the right to make such a declaration against the Government of the Union, if the relationship of the one to the other as to territorial limits, is conceded to be

case which affected an ambassador or other public minister, that the original jurisdiction of this court could not be maintained because the United States was plaintiff, and the inferior courts had jurisdiction upon that ground.

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> the usual and most effectual precautions are taken to secure this impartiality by confiding it to the highest judicial tribunal. (*Ibid.*, sec. 1681; the Federalist, 554.)

It thus seems clear that the reasoning of this court in the cases of Hans *vs.* Louisiana (134 U. S., 1) and North Carolina *vs.* Temple (*ibid.*, 22) as to the grant of judicial power in "all cases" arising under the Constitution, laws, and treaties of the United States, while reiterating the doctrine that a sovereign State was not liable to suit *by an individual* without its consent, can have no application where the United States seeks, through the original jurisdiction of this court, in a controversy to which both the United States and a State are the parties, to obtain, without resort to the political prerogative, a just and equitable determination of the cause of conflict.

Before the Constitution went into effect it was the right of one aggrieved State or sovereign, to demand satisfaction from another offending State or sovereign, and to enforce, if need be, that demand by war. This danger was removed by the "more perfect union" established under the Constitution; but it could hardly have been the intention of the Constitution that the frame of government it established should, while providing for the protection of the weak against the encroachment of the strong, as between two States—leave matters of controversy, liable and very likely to arise between the United States and a State, to the arbitrament of the political power, and not the same judicial arbitrament that was, by the Constitution, provided for the settlement of differences arising between the States themselves. Nor is it reasonable that the United States,

representing the interests of all the States, should be compelled to await the pleasure and submit to the perpetually enjoining processes to provide "the laws and delays" which a delinquent State has power to enact in the control of its internal government. (Curtis' Com., Vol. 2, p. 62.) Yet, this, or the appeal to the sword, are the alternatives suggested by the respondent's plea.

It would be interesting to hear the learned counsel who represent the State of Texas show a limitation upon the right of a State to resort to arms after failure at arbitration if, under the Constitution, a question of boundary is as contended, only within the political powers of the governments involved. Place them in the position of having "no common tribunal to decide between them" and the State is left as to this question in the attitude she occupied before entering the Union—free, independent, sovereign—compelled, it may be, to submit peaceably to what she deems an invasion and spoliation of her territory, but possessing the right recognized by the law of nations to resist with arms the real or imaginary encroachments. Yes, we submit that the logical sequence of a declaration by this court in favor of the position contended for is, that the failures at arbitration already made in this controversy may be followed by a declaration of war.

In case of actual invasion or imminent danger, a State may declare war, by virtue of section 10, clause 3, article 1 of the Constitution of the United States; and this reserved right embraces the right to make such a declaration against the Government of the Union, if the relationship of the one to the other as to territorial limits, is conceded to be

that of two foreign governments, having no judicial tribunal whose decision in such controversies are binding on both.

But whatever might have been the difference of opinion existing on this point, prior to the adoption of the eleventh amendment to the Constitution, it would seem that its adoption emphasizes the position we have taken. The decision in Chisholm *vs.* Georgia (2 Dall., 419–478) aroused the States of the Union to the fact that in defining the judicial power conferred on the National Government, there was a larger surrender of sovereign rights than its framers contemplated, and with this article the subject of revision, for the purposes of amendment, so as to construe and limit the judicial power of the Federal courts, the clause "to controversies to which the United States shall be a party," was left intact, as was also the power over controversies between a State and a foreign state.

There are thus two prominent facts touching the history of this clause which unite in bearing testimony to the intention of the framers of the Constitution. First, that the clause, though not in the original draft, was adopted without adverse comment; and, second, the failure to limit further the meaning of the clause when the question of amendment was under consideration.

This court, in construing the Constitution as to the grants of powers to the United States and the restrictions upon the States, holds that

> An exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition, and have laid it down as a general rule that where no exception is made in

terms none will be made by mere implication or construction (6 Wheat., 378; 8 *ib.*, 489, 490; 12 *ib.*, 438).

Up to the year 1854, the nearest approach to the exercise of the original jurisdiction of this court where both the United States and a State or States of the Union were upon the record before it, was the boundary controversy between Florida and Georgia, reported in 17 How., p. 478.

The State of Florida had some time previously (see 11 How., p. 293) filed her bill under the original jurisdiction of this court against the State of Georgia, asserting her claim to territory about four-fifths in extent, and much less in value than that involved in the present suit. The title under which Florida claimed was the same treaty under which the present claim is asserted.

During the progress of this suit, to wit, on December 15, 1854, the Attorney-General of the United States "moved the court that he be permitted to appear in said case and be heard in behalf of the United States in such time and form as the court shall order." (*Ibid.*, pp. 479, 480.)

This motion was insisted upon as a matter of right, not merely privilege, and this, too, though the rights of the United States might be distinct and separate. (*Id.*, 481.)

It is true the Attorney-General, in proposing to intervene in this case desired to do so, not as a technical party, not as joining with the one or the other party, but free to coöperate with, or to oppose, both or either; so the case was before the court rather as a question of equity prac-

tice than directly one of original jurisdiction over the parties.

It was insisted upon on the part of the State of Georgia that to grant the prayer of the United States would be a deliberate violation of the Constitution, because it would, by an artful contrivance to inject into the proceedings as a party litigant, a party as to whom the Supreme Court did not possess original jurisdiction (p. 483), so that, indirectly, the very question raised by the demurrer in this case was there presented to the court.

Mr. Chief Justice Taney, in the opinion of the court, thus states the case:

> Here is a suit between two States in relation to the true position of the boundary line which divides them. But there are twenty-nine other States who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court, for their interests may be different from those of either of the litigating States. And it would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned and with power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. (*Ibid.*, p. 493.)

The question here presented to the court was a novel one; was declared by the court to be "without example in the jurisprudence of any other country;" and presented to the court a condition of conflicting interests between a State and the General Government, touching title, jurisdiction, and sovereignty, with such force and distinctness

as to evoke from it a revocation and disregard of established rules of procedure and practice, as being inapplicable to parties in interest so situated.

The court, however, distinctly disclaims the purpose of passing upon the question of whether by the terms of the Constitution the United States can be made a party in an original proceeding in this court between States, or as to the power of the Attorney-General to appear in such a case for the Government *without an act of Congress to authorize it.* (*Ibid.*, p. 492.)

The conclusions reached by the court sustain the right of the Attorney-General to intervene without the direction of an act of Congress; to adduce evidence, either written or parol; to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States, and to argue the case for the United States before the court, and declares that—

> The General Government in bringing before us for consideration the rights and interests of the Union in the question to be decided does nothing more than perform a duty imposed upon it by the Constitution. And as the mode in which that duty is to be performed here is not regulated by law, but must depend upon the rules and regulations prescribed by the court, we shall not embarrass the proceedings by endeavoring to conform them strictly to English precedents and pleadings, and regard the mode in which the information on behalf of the United States has been presented to be the simplest, best manner of bringing their interests before the court, and of enabling it to do justice to all parties whose rights are involved in the decision. (*Ibid.*, p. 495.)

The opinion of the court in this case was dissented from by four of the justices who heard the case. Mr. Justice Curtis in his dissenting opinion, referring to the peculiar position in which the Government was placed by the judgment of the court, says:

> With submission to a majority of my brethren, I confess it seems to me that to deprive a party of some rights which, under all systems of law known to us are deemed essential, while other rights are allowed to him which can be conceded only to a party to the controversy, proves the embarrassment which was felt in carrying out the idea of making him a party; but does not overcome the difficulty or even avoid it. It appears to me to declare in effect, justice requires that you should be admitted as a party on this record; but, in order to make some distinction between yourself and other parties, you shall not enjoy all the rights of a party; and the particular rights which you are not to enjoy are the power of excepting to the pleadings and proofs of the other parties. (*Id.*, 503.)

While there has been no direct determination of the precise question now under consideration, the court has, however, exercised original jurisdiction of a suit brought by the United States against a State, but there was an appearance and plea by the law officer of the State. (*United States* vs. *North Carolina*, 136, U. S., 211.)

In this review of the various phases in which the relationship of the States to the Union has been the subject of investigation by this court there is shown by the opponents of the exercise of the power now invoked, a persistent and periodical presentation of the theory of

national nonentity, wherever the assertion of State sovereignty suggested a conflict of claims between the two governments. Out of these struggles the Union has, by the judgment of this court, been held forth and sustained as supreme in many contested cases where the declared objects in the establishment of the Union must have been meaningless if the limitations of power contended for had been sustained.

The source of this power was the highest sovereignty of the Union—the people. The powers confided to the several branches of the Government were declared to be given "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty" to them and their posterity.

Against all attempts at emasculation of the general Government she stands to-day clothed in power woven out of express limitations on the sovereignty of the States—sovereignty surrendered to operate for the benefit of the people in the enjoyment of the objects of the Union they formed. (6 Wh., 382.)

In order to establish justice it gave originally to the humblest foreigner the right to demand of a State obedience to the determination of this court upon any adjudication by it of his grievance. With the same end in view it still secures impartial arbitrament between citizens of different States. With an eye to insuring domestic tranquillity it remits to this tribunal controversies between two or more States or between a State of the Union and a foreign state. Its powers to provide for the common

defense and promote the general welfare have prevailed against both pen and sword, the means of the exercise of that power being approved by this court. When it was contended in *Cohens* vs. *Virginia* that this court could not exercise original jurisdiction where a State was a party over a case arising under the Constitution or laws of the United States because its jurisdiction in such cases was appellate, Mr. Chief Justice Marshall, with sublime eloquence, drew attention to the wide open doors of this temple of justice and asked:

> Can it be imagined that these same persons, who thought it necessary for the purposes of justice to provide a tribunal as superior to influence as possible, where a single individual might, however unimportant his claim, obtain an impartial trial, considered a case involving the Constitution of our country and the majesty of the laws—questions in which every American citizen must be deeply interested—as withdrawn from this tribunal because a State is a party? (6 Wheat., sec. 383.)

Adopting this patriotic and liberal construction, we ask can it be imagined that the same persons who declared in the same section of the Constitution that the Federal judicial power should extend "to controversies to which the United States should be a party, and to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority," considered the General Government impotent to invoke the aid of its own courts to construe its treaties and laws because its controversy was with one of the States? We think not.

DEMURRER NO. 4.

The filing of this demurrer grows out of the phraseology of section 25 of the Oklahoma act (p. 152, Record), in which the Attorney-General is directed—

> To commence in the name and on behalf of the United States, and prosecute to a final determination, a proper *suit in equity*, in the Supreme Court of the United States against the State of Texas, setting forth the *title and claim* of the United States *to the tract of land*, * * * in order that *the rightful title to said land* may be finally determined.

It is claimed that the bill filed in this cause shows the cause of action, if any exists, is *legal* and not *equitable*, and that the act of Congress required this to be done. In other words, that it is a suit to recover possession of land, which it is contended must be by common law action and not equitable suit.

THE CONSTITUTIONALITY OF THE ACT OF CONGRESS.

POWERS OF CONGRESS.

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof. (Sec. 8, clause 18, Art. I, Cons. U. S.)

The breadth of Congressional power under this section of the Constitution has frequently been the object of consideration both by the early writers and by this court. (*U. S. v. Fisher*, 2 Cr., 358; 1 Hamilton's Works, 119;

McCulloch vs. *Maryland*, 4 Wh., 315; *Parker* vs. *Davis*, 12 Wall., 457; *R. R. Co.* vs. *Johnson*, 15 Wall., 195.

The choice of means is vested in Congress. (2 Story on the Con., sec. 1245–1247.)

Every vested power is a sovereign power, and includes the right to employ means fairly applicable to the end sought. (*Ibid.*, pp. 142,143.)

In construing the words "necessary and proper" it should not be done in the restrictive sense, but they "ought to be liberally expounded in advancement of the public good" for—

> The means by which national exigencies are provided for, national inconveniences obviated, and national prosperity promoted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means. (*Ib.*, sec. 1251.)

The clause is an investitute of, not a restriction upon, the powers of Congress. (*Ib.*, 1254.; *McCulloch* v. *Maryland*, 4 Wheat., 419–420.)

Summing up an exhaustive review of the extent of Congressional power under this clause, Marshall, Chief Justice, speaking for the whole court, makes the test as follows:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution.

And further:

> But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the

> Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judiciary department and tread on legislative ground. (*McCulloch* vs. *Md.*, 4 Wh., 421–423; *Hepburn* vs. *Griswold*, 8 Wall., 615; *Parker* vs. *Davis*, 12 Wall., 531–535; 4 Elliott's Deb, pp. 220–225.)

One of the objects intrusted to the Government, to the legislative branch of the Government, is "to dispose of and make all necessary rules and regulations respecting the territory." (Art. 4, sec. 3, Cons. U. S.)

The management of and supervision over the territory of the Government is thus made the particular province of Congress. It has more than once been doubted or denied whether a suit could be brought in the name of the United States, save by authority of an act of Congress. In this case Congress has acted, directing a proper suit in equity to determine her rights in the premises.

The sovereign has legislated for the protection of her territorial rights of sovereignty by the same remedy which this court has uniformly held is appropriate to similar conditions affecting the States of the Union.

Let us apply the test laid down by the learned jurist quoted above. Is the end legitimate? Is it within the scope of the Constitution? Are these means appropriate and plainly adapted to that end? Are they prohibited? Are they consistent with the letter and spirit of the Constitution? Are they calculated to effect any of the objects intrusted to the Government? No vague suspicion of intended limitation of Congressional power can avail to render nugatory its acts. The doubt, if any ex-

ists, must be solved in favor of the right of power as exercised. This court has decreed that.

> A decent respect for a coördinate branch of the Government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress. (*Parker* v. *Davis*, 12 Wall., 531; *Com.* v. *Smith*, 4 Binney, 123; *Fletcher* v. *Peck*, 6 Cranch, 87.)

But this court, in any event, may adopt its own mode of proceeding. (*Fla.* vs. *Ga.*, 17 How., 493; *R. I.* vs. *Mass.*, 13 Pet., 23, 24; *R. I.* vs. *Mass.*, 14 *ib.*, 210.)

And it is in the power of Congress to give direction as to remedies in this court consistently with the Constitution. (*R. I.* vs. *Mass.*, 12 Pet., sec. 721.)

But in the absence of any legislation of Congress itself, as to the process and mode of procedure where the Supreme Court has original jurisdiction, the court itself may prescribe them. (Desty's Fed. Pro., § 678, *Fla.* vs. *Ga.*, 17 How., 478; *Chisholm* vs. *Ga.*, 2 Dall., 419; *New Jersey* vs. *N. Y.*, 5 Pet., 284; *Com.* vs. *Dennison*, 24 How., 266.)

THE CONSTRUCTION OF THE STATUTE.

If, however, it were admitted that this court was bound by the Constitution to adhere to the common law as to the remedies cognizable respectively at law or in equity, and that Congress had no power to prescribe the form of action through and by which the United States might assert her rights and sovereignty, still it is insisted that a true and proper construction of the act of Congress referred to removes the objection raised.

This honorable court has but recently passed upon this interesting question of its rule of construing a Congressional enactment, and declares that it will not assume that Congress deliberately directed an illegal proceeding, where the act in controversy, taken in connection with its prior acts, *in pari materia;* to the acts and proceedings of the Secretary of the Interior, the Commissioner of the General Land Office, and other executive officers, lead to a different conclusion as to its intention. (*U. S.* vs. *Dalles Military Road Co.*, 140 U. S., pp. 631, 632.)

In the case just cited the Attorney-General was directed to commence suits in equity to set aside certain land grants made to the State of Oregon. Various pleas, such as laches, stale claim, estoppel, the certificates of the governor and allegations of *bona fide* purchase, were interposed. Issue was joined upon these pleas, and judgment thereon was for the defendants and the bills were ordered to be dismissed. On appeals to this court it is held that—

> An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suits to be brought upon a stale claim. If laches be a good defense it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. (*Ibid.*, 632.)

Let us apply this reasoning to the plea now in issue.

In 1819 the United States made a treaty of boundary and limits with Spain; in 1828, Mexico having become independent of Spain, affirmed the said treaty on her part; in 1838, Texas having become a separate republic, did likewise; in 1843–'44 a controversy arises between the United States and the Republic of Texas as to the bound-

ary of the 100th meridian, growing out of the arrest of certain Texas Rangers by Capt. Cooke, of the U. S. Army (Rec., pp. 153–155); a military court of inquiry found in favor of the claim of the United States as to the point where the arrest was made; in 1857–'59 the United States Indian Department had the territory now in dispute surveyed and sectionized (Rec., p. 48, and testimony of James Edmunds); in 1859 boundary commissioners were by act of Congress ordered to be appointed to run and mark the still disputed boundary; from 1872 to 1882 it was occupied by Indians and United States troops (J. H. Richardson, qq. 5 to 8); in 1877 the U. S. Land Commissioner asserted jurisdiction over the county (Rec., pp. 144–148); in 1879 it was by Congress made part of the northern judicial district of Texas; in 1884 the first settlers located on the land in dispute (J. R. Crouch, q. 3); that same year Lieut. Crane, under an order from the War Department, gave notice to the settlers to vacate by October 1 (J. S. Elliston recalled); and (Rec., p. —) that same year President Arthur issued a proclamation asserting ownership by the United States (Rec., p. —); in 1885 Congress again passed an act for the appointment of boundary commissions (Rec. p. 151); that said last-named act was a substitute for the bill introduced by Mr. Wellborn, of Texas, to declare Greer County a part of Texas (Rec., p. 137–138), and this substitute accompanied a report of the Judiciary Committee of the House adverse to the bill of Mr. Wellborn, said report reiterating the claim of the United States (Rec., p. 143); that this second attempt at a settlement by commission failed for want of agree-

ment (Rec., p. 133); that the commissioners on the part of the United States claimed the territory in dispute as belonging to the United States and so reported (Rec., p. 126); that in 1887 President Cleveland issued a proclamation asserting the title of the United States (exhibit filed with bill); that the State of Texas through the intervention of her governor and Hon. W. H. Crane, M. C., begged that "executive action be suspended until the question of proprietorship of the disputed territory shall have been settled either by act of Congress or by judicial decree under Congressional sanction" (Rec., pp. 117–18); and in 1890, when Oklahoma was organized as a Territory, Congress, instead of following the many declarations of right and title above enumerated, inserted the twenty-fifth section before referred to, so that the views expressed by Mr. Crain as to the judicial decree might be acceded to, and the proposal of Mr. Coke, a U. S. Senator from Texas, became part of that act of Congress.

In the light of this history of Congressional and executive action, and following the rule of construction we have cited, it is insisted that the direction to prosecute a *proper* suit in equity should be that the intention of the legislative branch of the Government was that the Attorney-General should discover for himself those facts which had been brought to the attention of Congress and should then commence and prosecute such a suit in equity, based upon this history and upon those facts, as would be proper to settle the question of title, or taking the obvious meaning of the law to decide the question of disputed territory, for "the title of a State is sovereignty, full and absolute

dominion (2 Pet., 300–301): the title of an individual, such as the State makes it by its grant and law.

Applying the rule that "the intention of the legislature may be found from the act itself, from other acts *in pari materia*, and sometimes from the cause or necessity of the statute, and wherever the intent can be discovered, it should be followed with reason and discretion" (Dwarris, p. 144), then the act in question can not be construed as directing the Attorney-General to file a bill *in equity* for that which can only form the subject of an action at law.

Chief Justice Taney, in Brewer *vs.* Blougher (14 Pet., 197), laid down that—

> The best rule of interpretation to be adopted by the courts is to ascertain the meaning of the legislature from the words used in a statute and the subject matter to which it relates, and to restrain its operation within narrower limits than its words import, if satisfied that the literal meaning would extend it to cases which the legislature never designed to include.

We are aided in the construction of this particular statute by its own recitals, first, as to the existence of "a controversy between the United States and the State of Texas as to the ownership of what is known as Greer County," and, secondly, in its providing that "the court, on the trial of the case, may, in its discretion, so far as the ends of justice will warrant, consider any evidence heretofore taken and received by the joint boundary commission under the act of Congress approved January 31, 1885," thus establishing by necessary implication the purpose of the act to be the accomplishment, by the means

proposed, of that which was intended by the act of 1885, namely, a settlement as to the disputed boundary, which settlement would guide to action the now hesitating political branches of the Government. Speaking of recitals in a statute as furnishing a key to interpretation, Mr. Endlich says "they explain the legislative perspective in enacting the statute, and only this is, in any case, gained by the interpreter in looking at the surroundings," (p. 524).

It may be admitted that the words of the statute are not very clear as to the extent to which the court is to be requested to go in declaring as to the title to the land in dispute; but in such a case—

> The intention of the legislature is to be resorted to in order to find the meaning of the words. That meaning may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed. (*U. S.* vs. *Freeman*, 3 How., 565.)

In Mr. Endlich's new but excellant work on interpretation of statutes the author, discussing presumptions as to legislative intent, says:

> Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effect or consequences which would result from it, for they often point out the genuine meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is to be avoided. It is found sometimes necessary to depart, not only from the primary and literal meaning of the words, but also from the rules

> of grammatical construction, when it is improbable that they express the real intention of the legislature; it being more reasonable to hold that the legislature expressed its intention in a slovenly manner than that it intended something which it is presumed not to intend. (Endlich on the Interpretation of Stat., p. 151.)

And the same learned authority, following this line of construction, says:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because, in the widest, and, perhaps, natural sense, they have that meaning, would be to give them a meaning in which they were not really used. (*Ibid.*, p. 152; 2 Cranch, 390.)
>
> Where a statute is capable of two constructions that one is to be adopted which avoids a constitutional objection. (*Ala. and Chat. R. R.* vs. *Jones*, 5 *Bank Reg.*, 97.)

In order to arrive at a true construction it is permissible, and indeed sometimes requisite, for the court to "take judicial notice of contemporaneous history or other authentic works and writings." (Endlich on Int. of Stat., p. 38.)

> Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law. (*Ibid.*, p. 54.)

The law under which this suit is brought is in the nature of an act delegating powers and prescribing duties. If it applied to a subordinate local authority, the rule would be that "of two possible constructions that is to be adopted which is based on the theory that the legislature intended to give only such powers as were necessary to carry out the objects of the enactment." (Endlich on Int. of Stat., p. 490.)

THE STATUTE IS DIRECTORY.

It is plain from the language of the act under consideration that Congress intended the Attorney-General to consider and pursue what would be the proper equitable proceeding to determine the dispute referred in the inducement clause of the act, "inasmuch as there is a controversy, etc." It imposed upon him a public duty, but it left to his discretion and judgment the formulation of a proper bill in equity to carry out the plain purpose of the lawmaking power to bring about a final settlement of the dispute referred to, and obtain a judicial affirmation of the limits of national sovereignty, as against the claim of a State within the national boundary.

No rule has been laid down governing construction of statutes as to directory or mandatory scope of language more clearly than that—

> When a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only when injustice or inconvenience to others who have no control over

those exercising the duty would result if such requirements were essential and imperative. (Endlich, p. 613.)

See also Bishop on the Written Law (sec. 255), who says:

> A statute is termed directory when a part or all of its provisions operate merely as advice or direction to the official or other person who is to do something pointed out, leaving the act or omission not destructive of the legality of what is done in disregard of the direction.

And further in the next clause he says:

> That the interpretation (as to what is directory) will be adopted which will best subserve justice and the true legislative intent.

Perhaps the clearest definition of the distinction is that—

> It would seem to be more logical as well as precise to say that a statute or statutory provision is directory when the legislature intended that strict compliance with it should be left to the discretion of the party empowered to act under it and the conveniences and necessities of the occasion upon which it was to be applied, and did not intend that a failure to exercise the power conferred, or a failure of exact conformity with all the prescribed details in the execution of it, should render the same void, while a mandatory statute or provision would be one which the legislature intended to be strictly complied with, contemplating an exercise of the power conferred in it at all events and in exact conformity with all the prescribed details in the execution of it, as a condition of the legality and validity of the same. (Endlich, pp. 608, 609, note.)

The pleading under discussion rests its objection to the constitutionality of the act of Congress on the position that—

> It is not competent under the Constitution of the United States for the Congress of the United States to declare that a suit at law shall be a suit in equity, and that legal rights shall be tried and determined in the courts of the United States as if they were equitable rights.

The same position was taken and insisted upon by counsel for the State of Massachusetts in the case of *R. I.* vs. *Mass.* (12 Pet., 679). It was there urged that in the delegation by the States of judicial power over controversies between two or more States it was "never intended to include in these controversies questions of sovereign right," but the decision of the court, based upon the reason and history of the law, overruled that assumption and has formed the rule by which many questions affecting the boundaries between States have been adjudicated by this court. (*Ibid.*, 720–722.)

The case just quoted was before this court upon a motion to dismiss for want of jurisdiction, and almost the identical question raised by the respondent's plea in this case was then before and passed upon by this court. The attorney-general for the Commonwealth of Massachusetts, quoting a number of cases in support of his position, concluded his argument in support of his motion to dismiss with the language:

> Because, if it seeks an adjustment of boundaries *without claim to the soil*, such a cause is no subject of

> equity jurisdiction. * * * If the boundary is ascertained, and the defendant has encroached upon the complainant, the right between individuls must be ascertained in an action at common law and not by bill in chancery. (*Ibid.*, p. 686.)

Mr. Baldwin, J., in the opinion of the court, sets at rest the question of the proper procedure in a controversy respecting boundary between States, in the following language:

> No court acts differently in deciding on boundary between States than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied, without either, they decree what and where the boundary of a farm, a manor, a province, or a State, is and shall be. (*Ibid*, p. 734; 2 Pet., 309–1.)

If then, the court shall be of opinion that the act of Congress, judged and construed in the light of its own preamble or matter of inducement, with its contemporaneous history, prior legislation in relation thereto, and its own provision as to considering evidence taken by the joint boundary commission, merely contemplated a suit to settle the boundary line between the United States and Texas, then by the edict of this court, equity was the proper remedy to pursue, even if the act of Congress had been silent in its direction on that point.

IS THE BILL DEFECTIVE?

If in the argument presented as to the constitutionality of the act under which this bill was filed the court shall be of opinion that the plea is not well founded, the matter of the other objection urged in the demurrer of respondent is not of such vital bearing upon the case. The subject already discussed strikes at the root of the action, the subject now approached only at one of the branches. The one operates an estoppel of further proceedings, the other only a temporary suspension of procedure until the pleadings can be amended.

Congress directed a proper suit *in equity*, and no other suit could be brought under the provisions of the act. It directed the bill to set forth the title and claims of the United States to the tract of land in controversy, and the bill states a series of facts upon which the title and claims of the United States must stand or fall in any tribunal, judicial or political. They are briefly stated as follows:

First. She claims that under a treaty with Spain, made in 1819, ratified by Mexico in 1828, and by the Republic of Texas in 1838, the true boundary of the United States embraces all the territory lying between the South Fork or main Red River and the North Fork of Red River, as belonging to and subject to the jurisdiction and control of the United States, and does not belong and is not subject to the jurisdiction and control of the State of Texas. (P. 15, bill.)

Second. That by the admission of Texas as one of the States of the United States, said boundary became the

boundary between the United States and Texas. (P. 7, bill.)

Third. That Melish's map of 1818 was made the map of said treaty of 1819; but that said map, in delineating the stream called Red River, ran a single and imaginary line for a long distance in the direction of what he supposed would lead to the source of the stream; that he was ignorant of the existence of forks to said stream, which have since been discovered by explorers, and that consequently his line was intended to represent the main Red River as contradistinguished from any of its forks or tributaries. (P. 12, bill.)

Fourth. That if the King of Spain knew of physical and geographical conditions of the territory ceded in conflict with or explanatory of the map of the treaty it was his duty to impart such knowledge to complainant. (Pp. 12, 13, bill).

Fifth. That in 1850 Texas ceded to the United States all her territory exterior to certain limits. (Pp. 8–10, bill).

Sixth. That in 1852 Capt. R. B. Marcy, of the U. S. Army, explored the now disputed territory, reported the existence of certain forks to the stream called Red River, and that the stream contended for by the United States as the boundary line was the main Red River. (P. 13, bill).

Seventh. That in 1857 the United States caused to be made a survey of the 100th meridian line and caused a monument to be established at the intersection of said meridian with main Red River aforesaid, thereby assert-

ing title to and jurisdiction over the disputed territory. (P. 11, bill.)

Eighth. That in 1860, joint boundary commissioners met to adjudicate the question of boundary, but dissolved the commission without reaching an agreement. (Pp. 13, 14, bill.)

Ninth. That while the question was a matter of dispute the legislature of Texas did, in February, 1860, designate the disputed territory as a county of the State to be known as "Greer," and has by virtue of her legislation "assumed and exercised control and jurisdiction over said tract of land or territory." (Pp. 15, 16, bill.)

Tenth. That the conflict of claims continued until 1882, when legislation was had looking to a new boundary commission, which met in 1886, but like its predecessor was unsuccessful in reaching an agreement. (Pp. 16–20, bill.)

Eleventh. The bill shows the dimensions of the territory by survey made under authority of the United States, and asserts that she has never voluntarily abandoned or relinquished her claim of title and jurisdiction. (P. 21, bill.)

Twelfth. That in 1879 Congress, *by inadvertence*, included Greer County in the act creating the northern judicial district of Texas; but that such act was not treated or considered by either party as settling the disputed question of boundary. (P. 22, bill.)

Thirteenth. That in 1886 certain post-offices were established and designated as in "Greer County, Texas;" but in the same year, upon discovery that they were in the

disputed territory, the error was corrected, so as to locate said offices in the Indian Territory. (P. 23, bill.)

Fourteenth. That Texas has, without right, or title, taken possession of and endeavored to extend her laws and jurisdiction over the territory; has excluded the United States from possession and jurisdiction," in violation of her treaty rights; all of which is *an invasion of her sovereignty* and tends to disturb peace and amity between the governments. (Pp. 23–4.)

Fifteenth. That in 1887 the State of Texas gave notice of her purpose to place the land in dispute upon the market for sale, whereupon the President of the United States, by proclamation, asserted that the title to and jurisdiction over the territory were vested in the United States, and warned all persons against any act in conflict therewith. (Pp. 26–7.)

The above collates, in brief, the statement part of the bill filed; and these facts are by the demurrer claimed to show that "it is a suit to recover certain real property, * * * and that the cause of action is legal and not equitable."

A comparison of the matters alleged in this bill with the allegations of any of the numerous suits of this nature heretofore adjudicated by this court will, we think, fail to sustain the objection.

In *Rhode Island* vs. *Massachusetts* the bill set forth the title to the disputed territory from the several charters under royalty; the release from royal rule; defined the boundary lines under the letters patent; the wild nature of the country at the date of the grant; that the northern

boundary line had never been "settled, defined, or established," and hence arose disputes and controversies; that fruitless efforts had been made to adjust the boundaries; it detailed the legislative enactments and the failure of two sets of boundary commissioners to agree; asserted the right of Rhode Island to the territory; that Massachusetts was in possession, exercising sovereignty and jurisdiction, which conduct interfered with the exercise of that jurisdiction and sovereignty over the whole tract of land mentioned, to which Rhode Island was entitled. (12 Pet., 662–664.)

The prayer of this bill in the case cited, not only asks the establishment of the true boundary line, but that the rights of jurisdiction and sovereignty to the whole tract of land, with *the appurtenances* mentioned, * * * may be restored and confirmed to complainants, and that *the title*, jurisdiction, and sovereignty over the same be confirmed and established, and for general relief.

If there is no question as to the jurisdiction of the court over the parties and the subject-matter of the present suit, we have then only to inquire if the matters stated in the bill and the relief prayed for, or any of them furnish a subject on which the court can act. On a question presented to this court by motion to dismiss the bill in *Rhode Island* vs. *Massachusetts* the court says:

> This depends on our jurisdiction over any of the matters on which the plaintiff asks our interposition. If there is any one subject on which we can act the bill must be retained, so that the true inquiry is not as to the extent, but the existence of any jurisdiction. (P. 731.)

It is an established rule in such cases that if the court can decree any relief specially called for, or any other relief consistently with the specific prayer, it must proceed in the cause. (10 Pet., 228; 8 *Ibid.*, 536; 12 *Ibid.*, 731.)

The case now before the court, being purely an issue on original boundary, varied only so far as it may be affected by the act of the Texas legislature of 1850, and the cession thereunder, is a question, as already shown, which is appropriate to a court of equity. When the court grants the prayer for a settlement of the boundary the title or right of jurisdiction and sovereignty follow, and if the plaintiff obtains relief as to the establishment of the boundary he wants no other. (12 Pet., 734.)

Indeed, this rule was established before the century opened. In 1799 it was laid down that though a State could not sue *at law* for an incorporeal right, such as sovereignty and jurisdiction, still she had a remedy by bill in equity to settle disputes as to boundary. (3 Dall., 413; 12 Pet., 742,743.) This is all that is sought by the bill against which this demurrer is filed. It asks to be heard—

First. For the purpose of determining and settling the true boundary line and to put at rest questions which now exist as to which of two streams constitute the true boundary line of the treaty establishing the same, and whether the tract of land called "Greer County" is within the boundary and jurisdiction of the United States or of Texas.

Second. It prays that Texas be required to define specifically the claim she hath to the territory in dispute.

Third. It prays for a decree establishing the rights, claims, and jurisdiction of the United States as claimed in said bill.

Fourth. It prays for general relief.

Which prayer it is respectfully submitted asks only of the court that relief which equity alone can grant.

It is therefore insisted upon that the bill is sufficient in law, that the court has jurisdiction, and the case should be heard on its merits.

Respectfully submitted.

EDGAR ALLAN,
Special Assistant to the Attorney-General.

Office Supreme Court U. S.
FILED,
DEC 3 1891
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

THE STATE OF TEXAS, DEFENDANT.

BRIEF OF THE STATE OF TEXAS ON DEMURRER.

A. H. GARLAND,
GEORGE CLARK,
H. J. MAY,
C. A. CULBERSON, Att'y Gen. of Texas,
Solicitors for defendant.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

[ORIGINAL, NO. 5.]

THE UNITED STATES OF AMERICA, COMPLAINANT,

vs.

THE STATE OF TEXAS, DEFENDANT.

Statement of the Case:

This suit is prosecuted under section 25 of the Act of Congress approved May 2nd, 1890, to provide a temporary government for the Territory of Oklahoma, and for the purposes of the demurrers, the allegations of the bill may be thus summarized: On the 22nd day of February, 1819, a treaty was concluded between the United States of America and Spain, which was ratified and proclaimed February 22nd, 1821, by which the limits of the respective bordering territories in North America of the contracting powers were designated. By Article 3 of said treaty it was stipulated that—

> "The boundary line between the two countries, West of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32nd degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course to the Rio Roxo westward,

to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818. But if the source of the Arkansas River shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea: All the islands in the Sabine, and the said Red and Arkansas Rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the Sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations."

At that time the territory now the State of Texas belonged to Mexico, which was a part of Spain. The manner in which the line thus designated should be marked was provided in Article 4 of the treaty as follows:

"To fix this line with more precision, and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a Commissioner and a surveyor, who shall meet before the termination of one year from the date of the ratification of this treaty at Natchitoches, on the Red River, and proceed to run and mark the said line, from the mouth of the Sabine to the Red River, and from the Red River to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42, to the South Sea; they shall make out plans, and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this

treaty and shall have the same force as if it were inserted therein. The two Governments will amicably agree respecting the necessary articles to be furnished to those persons, and also to their respective escorts, should such be deemed necessary."

In 1824 Mexico became an independent republic and as a consequence the boundary line defined in the treaty of 1819 became the boundary line between the United States and Mexico. On the 12th day of January, 1828, a treaty was concluded between the United States and the Republic of Mexico, which was ratified and proclaimed April 5th, 1832, by which the boundary line above mentioned was recognized as binding between the two countries. In 1836, Texas declared her independence of Mexico, and in 1837 was recognized as an independent Republic.

On April 25th, 1838, a treaty was concluded and on October 12th and 13th, 1838, was ratified and proclaimed, between the United States and the Republic of Texas by which the limits fixed in the treaty of 1828 between the United States and Mexico were declared binding and in force. Articles 1 and 2 of the last named treaty thus provide for marking the boundary, and fix the status of the territory until the boundary is marked in the manner prescribed:

"ARTICLE I.

"Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the termination of twelve months from the exchange of the ratifications of this convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enter the Gulph of Mexico, to the Red River. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. The two Governments will amicably agree respecting the necessary articles to be furnished to those persons, and also as to their respective escorts, should such be deemed necessary.

"ARTICLE II.

"And it is agreed that until this line shall be marked out as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised; and that the remaining portion of said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other, within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised."

While Texas was a Republic no steps were taken to mark the boundary lines under the provisions of this treaty. By the joint resolutions of Congress of March 1st, 1845, and December 29th, 1845, Texas was admitted into the Union, whereby the boundary line aforesaid became a boundary line between the United States and the State of Texas, to be run and marked as provided by the terms of said treaty. On the 9th day of September, 1850, the United States purchased a portion of the territory of the State of Texas, by which the Northern and Western boundaries were fixed, but it is alleged that said purchase, and the acts of Congress and the Legislature of Texas authorizing it, were not intended and did not adjust the right to the territory between the North and South forks of Red River, bounded on the West by the 100th meridian, which is the subject of this suit. It is alleged that for forty years after the treaty of 1819 no other action was taken looking to the settlement of the boundary lines; that no official survey of any part of said lines was made and no monuments planted to designate any points mentioned in the treaties; and that between 1857 and 1859 Jones and Brown, under contract with the Commissioner of Indian Affairs for the United States, made an astronomical survey of the 100th meridian and established a monument at the intersection of said meridian with what is termed main Red River. It is also alleged that in 1859 Joint Commissioners on the part of the United States and

the State of Texas commenced the work of running the boundary lines aforesaid but that in consequence of differences which sprung up between the commissioners they did not long continue in co-operation in the work, and in the year 1860 the United States' commissioner completed the work alone. It also appears from the bill that in 1860 the State of Texas created the County of Greer out of the territory in dispute; that in 1882, without any further action than that heretofore mentioned being taken to mark and determine the boundary, the Legislature of the State of Texas passed an act which provided for running and marking the lines by commissioners in connection with commissioners for the United States; that in 1885 the Congress of the United States passed an act authorizing the President to appoint a commission to act in connection with a similar one to be appointed by the State of Texas to run and mark said lines; and that said Joint Commision deliberated but was unable to agree and adjourned *sine die* in August, 1886. The bill also alleges that the surveys made by Jones and Brown and that of the United States Commissioner aforesaid were to the effect that the disputed territory belongs and is subject to the control and jurisdiction of the United States, though never officially agreed upon or accepted by the two Governments, as contemplated in the act of Congress authorizing the surveys; that by virtue of the treaty of 1819 the United States "became entitled to possession of and jurisdiction over all that parcel or tract of land which lies between what has been herein designated as the Prairie Dog Town Fork or main Red River and the North Fork of Red River, which said parcel of land, according to the survey made by Jones and Brown, aforesaid, contains 1,511,576.17 acres, and is more accurately described as the extreme portion of the Indian Territory lying West of the North Fork of Red River and East of the 100th meridian" and that the United States has never "voluntarily abandoned or relinquished such claim of title and jurisdiction, but has continuously asserted the same at all times since the ratification of said treaty of 1819 up to the present time and does still assert the same." It is admitted that in 1879 the Congress of the United States created the Northern Judicial District of Texas and included therein the disputed territory by designation as Greer County, Texas; and

that in 1886 the Post Office Department of the United States established post offices in said territory by the same designation, but it is alleged that in each case it was done by inadvertence and in the latter case the designation has been changed to Indian Territory. The bill charges that at the date of the treaty of 1819 the main stream of Red River ran as now claimed by the United States; that what is called North Fork of Red River also ran as now claimed by the United States; that what is claimed as the main Red River by the United States, and river of the treaty, was then, as now, longer and wider and drained a larger area of country, and in all respects corresponded more nearly to the Red River, as laid down on the treaty map, than did the North Fork of Red River; that in fact the map of the treaty shows no stream beyond the confluence of the forks of Red River referred to running Westward which in any way answers to the condition, direction and surroundings of the North Fork of Red River; and that the map was made by Melish without accurate knowledge on his part of the westward course of Red River beyond said confluence. There is no allegation in the bill that the boundary cannot be determined and marked in the manner provided for in the treaty or that the State of Texas declines to co-operate with the United States in that method of determination. Having alleged that the State of Texas without right or title thereto had claimed, taken possession thereof, and endeavored to extend its laws and jurisdiction over the said parcel or tract of land, the prayer of the bill is that the said State be required to make a full and complete answer thereto and that upon "final hearing your Honors may enter a decree establishing the rights, claims and jurisdiction of your oratrix as claimed in her said bill" and grant such other relief in the premises as the nature and circumstances of the case may require and to equity shall seem meet and proper. The defendant demurred to the bill, alleging four causes therefor. The third ground of demurrer, however, that the Melish map improved to January 1st, 1818, and referred to in the treaty is not attached to or made part of the bill, having been avoided by attaching a tracing of said map to the amended bill, need not be further noticed. The others will be separately considered.

I.

Before considering the demurrers it seems to us proper that the preliminary question should be called to the attention of the court whether the State of Texas is suable in this cause. As a State cannot be sued without its express consent the inquiry is whether the defendant has authorized this suit to be instituted and prosecuted against it. In our opinion it is not a matter of choice of tribunals or expediency of interposing the privilege of exemption from suit, but it involves the jurisdiction of the court and upon it depends the validity of any decree which may be rendered. Rhode Island v. Massachusetts, 12 Peters, 657.

It is true the Governor of the State directed the Attorney General to enter the appearance of the defendant, and that has been done and issue joined. Yet that would seem to place the matter in no other light than would have been the case had a subpœna in chancery issued and been served as provided by the act of Congress. Nor is it probable that anything more was intended. If, however, the direction of the executive can be held to have the broader effect of consenting that the State might be sued, the more important question still remains whether he was authorized to do so, for both by this Court and the Supreme Court of Texas it is held that the State cannot be sued except by express authority of the law making power. "There is in this country, however," said Mr. Justice Miller "no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued except in the law making power, which may give such consent on the terms it may choose to impose."

United States v. Lee, 106 U. S., 205.
The Davis, 10 Wall., 19.
Bates v. Republic, 2 Texas, 616.
Borden v. Houston, 2 Texas, 594.
Chevallier v. State, 10 Texas, 316.
Marshall v. Clark, 22 Texas, 32.
Rose v. Governor, 24 Texas, 504.

At no time has the legislature of Texas expressed its consent

that this suit should be instituted against the State. On the contrary, that body seems disposed to insist upon the method of determining the boundary line provided for in the treaty, as is evidenced by the latest legislative expression on the subject in the act of May 2nd, 1882, providing for its determination by a joint commission.

General Laws Texas, Called Session, 1882, p. 5.

Under the general law, as we have shown, neither the executive nor any other officer has authority to consent that the State shall be sued. Nor does it appear that such authority is conferred upon the Governor of Texas by any express law, if indeed it may lawfully be done.

It is understood that in this case the Governor, in directing the appearance of the State to be entered, acted under the provisions of the statute of April 4th, 1887, passed more than three years prior to the institution of this suit, in which it is enacted that the "Governor is hereby authorized to order through the proper officials the institution, prosecution or defense of any civil action or suit whenever he deems such course proper for the assertion or defense of any right of the state, and to render to said officials such assistance as to him may seem necessary or expedient," but it is not believed this act can be construed to vest in the Executive the extraordinary law-making power of waiving the exemption of the State.

General Laws, Texas, 1887, p. 138.

We do not overlook the settled rule that in cases in which a State shall be a party, in which this court has original jurisdiction, the adoption of the Constitution gave the consent of the States to be sued.

Rhode Island vs. Massachusetts, 12 Peters 657.

In this case, however, as we shall hereafter attempt to show, this provision of the Constitution is inapplicable.

United States vs. Ferreira, 13 How., 52 and note by Chief Justice Taney.

Florida vs. Georgia, 17 How., 478.

II.

The first ground of demurrer is "that it appears by the com-

plainant's own showing by the said bill that she is not entitled to the relief prayed by the bill against this defendant, in that complainant seeks by her said bill to obtain from this Court a decree judicially settling and determining the true boundary line between the United States of America and the State of Texas, which question is political in its nature and character and not susceptible of judicial determination by this Court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States."

It will be observed that this demurrer suggests not only that the question is in its nature political but that, contrary to the rule governing controversies between two States of the Union, it is such a political question that this Court cannot judicially determine it in the exercise of the jurisdiction conferred by the Constitution. That a controversy respecting the boundary between two independent nations is a political and not a judicial question is well settled. "A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the Courts of every country must respect the pronounced will of the legislature." * * * * * * "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided."

Foster vs. Neilson, 2 Peters 253,
Cherokee Nation vs. Georgia, 5 Peters 1,
United States vs. Arredondo; 6 Peters 710,
Garcia vs. Lee, 12 Peters 511.

This rule undoubtedly applied to the treaty of 1819 between the United States and Spain, to that of 1832 between the United States and Mexico and to that of 1838 between the United States and the Republic of Texas, when they were respectively ratified, and no reason is perceived why, after Texas was admitted into the Union, a different principle should control. The several treaties remain intact and are the contracts which define and regulate the relations of the contracting powers.

Wilson vs. Wall, 6 Wall., 87.

So, also, the method or tribunal provided by the treaty for the

settlement of differences arising thereunder must be resorted to; and as the treaties under consideration stipulate that the boundary shall be determined and marked by Commissioners appointed by the respective powers, certainly not a judicial tribunal, it is evident that in its inception the question was political, to be adjusted according to the course of nations, and so remains.

Green vs. Biddle, 1 Wheat, 1,
United States vs. Ferreira, 13 How., 46.

This view is supported by the fact that, according to the allegations of the bill, although the controversy over the boundary then subsisted, the Republic of Texas, on entering the Union, was not called upon and did not surrender its right as an independent sovereignty to adjust its boundary with the United States under the terms of the treaty and pursuant to the law of nations. Under the circumstances it must be regarded as significant that by the joint resolution of March 1st, 1845, the United States proposed and the Republic of Texas accepted admission into the Union upon the distinct and single pledge, thus excluding all others upon that subject, so far as future settlement of boundaries was concerned, that "said State to be formed subject to the adjustment by this government of all questions of boundary that may arise *with other governments*." It is also apparent that this boundary question was in contemplation of Congress when by said resolution the extent of the new State was limited to "the territory properly included within and rightly belonging to the Republic of Texas" and as no method of establishing the boundary was therein provided, it must be assumed that the provisions of the treaty in this particular, and the principles governing its interpretation and enforcement, were intended to remain unchanged.

But if the Court shall be of opinion that this controversy, coming over from a time when the two governments were independent, is not a political question to be determined upon principles of law applicable to nations, but is analogous to boundary differences between States of the Union of which the Court has original jurisdiction (Florida v. Georgia, 17 How. 478; Rhode Island v. Massachusetts, 12 Pet. 657; Alabama v. Georgia, 23 How. 510;

Virginia v. West Virginia, 11 Wall. 39) then it is submitted that the judicial power of the United States, and especially the original jurisdiction of this Court, does not extend to controversies between the United States and an individual State.

III.

This contention is embodied in the second ground of demurrer "that it appears by the terms of complainant's bill that this is a suit by the United States of America against the State of Texas, and it is not competent under the Constitution and laws of the United States for said United States of America to sue one of its component States in her own courts. And especially is it true that said United States is not empowered under her Constitution and laws to sue the State of Texas in a court of the United States for the recovery of a right mutually claimed by the United States of America and the State of Texas, to wit: the ownership of certain designated territory and the establishment of the boundary line between the respective governments."

The Constitution provides that the judicial power shall extend to controversies to which the "United States shall be a party;" to "Controversies between two or more States;" "between a State and citizens of another State," and "between a State or the citizens thereof, and foreign States, citizens or subjects." The Supreme Court, by the clause immediately following, is given original jurisdiction only in "cases affecting Ambassadors, other public ministers and consuls, and those in which a State shall be a party." It is to be noticed that wherever a State is mentioned in the clause declaring the extent of the judicial power, the opposite party to the controversy is also mentioned and in no instance does it include the United States. In other words the parties with whom the separate States can have legal controversies cognizable in the courts of the United States by reason of the parties thereto, are distinctly named and all others are necessarily excluded. Keeping in view the eleventh amendment it has been justly said, so far as the present question is concerned, that the controversies over which the United States Courts are given jurisdiction are "those to which the United States might be a party; those to which a State of the Union might be a party, *where the opposite party was another State of the Union.*"

2 Curtis Hist. Const. 444.

The clause establishing the judicial power is arranged by subjects and parties, carefully and accurately grouped, and the cases in which the United States shall be a party are distinctly separated from those in which a state may be. The cases of which this Court has original jurisdiction are defined alone by reference to the parties and only two classes of cases are included, namely: those affecting ambassadors, other public ministers and consuls, and those in which a State, in cases over which the judicial power is by the preceding clause extended, shall be a party. In all the other cases mentioned the jurisdiction is declared to be appellate. It seems manifest to us, therefore, that the judicial power does not extend to controversies between the United States and an individual State, nor is the Supreme Court given original jurisdiction in such cases. In this connection, as strengthening this position and illustrating the purpose of the framers of the Constitution, it is worthy of mention that although it was proposed in the Convention to stretch the judicial power to all questions which "involve the national peace and harmony" and "all controversies *between the United States and an individual State* or the United States and the citizens of an individual State" neither of the propositions, in the breadth proposed, were adopted.

2 Mad. Papers 861.

3 " " 1366.

A more specific proposition to vest in the judiciary of the United States authority "to examine into and decide upon the claims of the *United States and an individual State to territory*" was peremptorily rejected.

Mr. Justice Campbell, 17 How. 521.

That this Court is without original jurisdiction in cases in which the United States shall be a party was held by Chief Justice Taney in a note to the case of the United States v. Ferreira, 13 How. 52. Subsequently, it is true, he delivered the opinion of the Court in the case of Florida v. Georgia, 17 How. 478 in which the United States were permitted to adduce evidence in the controversy between Georgia and Florida, but neither the decision nor the opinion indicate a change of views on the subject. The opinion distinctly announces that the "Court do not regard the United States, in this mode of proceeding, as either plaintiff

or defendant; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor."

The true rule on the subject is thus stated by Mr. Justice Curtis in his dissenting opinion in the above case, and it is not necessarily inconsistent, we think, with the opinion of the majority of the Court:

> "In distributing this jurisdiction, the constitution has provided that, in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.
>
> "I am not aware that any doubt has ever been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the Congress, in the judiciary act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day." * * * * * "We have, then, two rules given by the constitution. The one, that if a State be a party, this court shall have original jurisdiction: the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.
>
> "It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may have its just and full

effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the Supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

"And when it says: 'in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction,' it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

"So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

"It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

"But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the constitution pledges the power of the nation to guarantee to every State a republican form of government; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts, forms no exception to the general proposition, that the constitution confers on the United States powers to govern the people, and not the States.

"There is, therefore, nothing in the general plan of the Constitution, or in the nature and object of the powers it

confers, or in the relations between the general and State governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States."

If this position be sound it necessarily follows that the act of Congress under which the suit is instituted is void.

Marbury v. Madison, 1 Cranch 137.

In re Metzger, 5 How. 176.

IV.

It is finally insisted, as ground of demurrer, and set out in the amended answer of defendant, "that this Court sitting as a court of equity has no jurisdiction to hear and determine this controversy between complainant and defendant because, as appears from complainant's bill and amended bill, complainant's cause of action is legal and not equitable, and that it is a suit or action to recover certain real property claimed by complainant and fully described in the bill of complaint; and if complainant has any right to recover such right must be asserted, if at all, in a court of law and not in a court of equity as herein attempted. And this defendant further says that so much of the act of Congress of May 2nd, 1890, under which this suit is brought, and which authorizes and directs the Attorney General of the United States to commence in this Court in the name and on behalf of the United States and to prosecute to a final determination a proper suit in equity setting forth the title and claim of the United States to the tract of land in controversy, is unconstitutional and void in this, that it is not competent under the Constitution of the United States for the Congress of the United States to declare that a suit at law shall be a suit in equity and that legal rights shall be tried and determined in the courts of the United States as if they were equitable rights."

If it be true that the right asserted under the act of Congress and set out in the bill is a legal and not an equitable right, there can be no doubt of the want of authority in Congress to direct its prosecution by proceedings in equity, for the distinction between legal and equitable rights and remedies is recognized by the Constitution.

Bennett vs. Butterworth, 11 How., 669

Thompson vs. R. R. Co., 6 Wall., 134.

Scott v Neely 140 U.S. 106.

The right claimed by the United States in this case is the legal title to the body of land forming the county of Greer. It asserts this legal title, undertakes to trace it through solemn muniments and seeks to recover possession of the land.

The State of Texas also claims title to the land through the same treaties, and asserts its right of possession not only under said treaties, but under the reservation of ownership contained in the articles of annexation to the United States.

The act of Congress under which the suit was instituted recognizes that the claim of the United States is of a legal nature. It recites that "inasmuch as there is a controversy between the United States and the State of Texas as to the ownership of what is known as Greer county it is hereby expressly provided that this act shall not be construed to apply to said Greer county until the title to the same has been adjudicated and determined to be in the United States," directs the Attorney General to commence and prosecute to final determination a suit "setting forth the title and claim of the United States to the tract of land" described, and "claimed by the State of Texas as within its boundary and a part of its land," in "order that the rightful title to said land may be finally determined." The bill alleges that the United States by reason of their title, which is fully plead, are "entitled to possession of and jurisdiction over all said parcel or tract of land," consisting of 1,511,576.17 acres, and prays that the rights, claims and jurisdiction of the United States be established as claimed.

It is believed the cause of action as defined in the act and set out in the bill is legal and not equitable, and consequently the bill should be dismissed.

Lewis vs. Cox, 23 Wall., 466.

Cavedo vs. Billings, 16 Fla., 261.

Loker vs. Rolle, 1 Veasey, Jr., 4.

1 Pomeroy Equity Jurisprudence, sect. 709, et seq.

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